

***United States Court of Appeals
for the Second Circuit***



APPENDIX

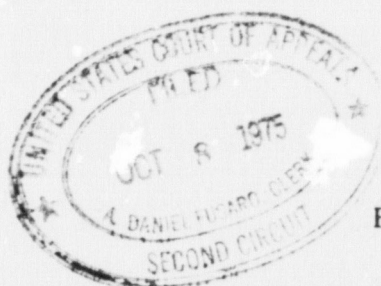
75-7475

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff-Appellee,



vs.

E. RENE FRANK,

Defendant-Appellant.

JOINT APPENDIX

BERNARD HIRSCHHORN

Attorney for Defendant-Appellant

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DOCKET SHEET ENTRIES

<u>Date</u>	<u>Proceedings</u>
5-1-73	Filed complaint, issued Summons
5-1-73	Filed Order appointing Paris Mitchell to serve process, clerk
5-23-73	Filed Certificate of Mailing summons and complaint by registered mail, return receipt requested, addressed to: Port Oasis Club, Marbella (Malaga) Spain receipt No. 549830; receipt received 6-8-73
6-27-73	Filed Amended Complaint
7-26-73	Filed Stip & Order that the time for dft. E. Rene Frank to answer to complaint is extended to 8-15-73. Ward J.
8-24-73	Filed 3rd pty Complaint, adding deft.
9-10-73	Filed 3rd pty Summons and marshals ret. Served Salma Saw Sawyne on 8-30-73.
9-25-73	Filed plttf's Reply to counterclaims
11-5-73	Filed 3rd pty deft's Answer to 3rd pty complaint
1-14-74	Filed plttfs. Notice of Deposition of deft. & 3rd pty plttf. E. Rene Frank on 1-29-74
1-14-74	Filed Plttfs. Notice of Deposition of deft. & 3rd pty plttf. E. Rene Frank on 1-29-74 (2nd one)
1-25-74	Filed Affidavit in opposition to deft. & 3rd pty plttf. application for an order postponing his deposition etc. by Gerlad J. Fields
1-28-74	Filed deft's affdvt & notice of motion to postpone deposition ret. 1-29-74
1-28-74	Filed affdvt of deft in reply to affdvt of Gerlad J. Fields
1-29-74	Filed memo endorsed on motion filed 1-28-74 -- motion granted. Deposition of deft. 3rd pty plttf is directed to commence on 2-13-74 So Ordered--Ward, J. mailed notices
2-1-74	Pre-trial conference held by Ward, J.
4-4-74	Filed Order to Show Cause ordered that the aforesaid deposition of plttf. by Renatus Ruet notice for 4-12-74 is hereby stayed pending the determination on this motion ret. 4-4-74 at 4:00 P.M. Ward, J.
4-74	Filed plttfs. Memorandum of Law
4-12-74	Filed plttfs. objections to defts. written interrogs.
4-12-74	Filed plttfs. answers to defts. written interrogs.
4-29-74	Filed deft. & 3rd pty plttfs. Memorandum of Law
4-29-74	Filed Deft. & 3rd pty plttfs. affidavit by E. Rene Frank in opposition to plttfs. order vacating notice of deposition
4-29-74	Filed reply affidavit by David C. Taylor

DOCKET SHEET ENTRIES

<u>Date</u>	<u>Proceedings</u>
5-9-74	Filed Memo. End. on OTS dated 4-4-74. Motion denied Ward, J. (mailed notice)
5-15-74	Filed Order to Show Cause to add 3rd pty deft., etc. ret. 5-17-74, Ward J.
5-15-74	Filed deft. & 3rd pty plttfs. Memorandum of Law in support of his motion to and Interboden S.A., etc.
5-17-74	Filed deft. & 3rd pty plttf Memorandum of Law
5-17-74	Filed affidavit by Gary P. Rosenthal in opposition to the application of deft. & 3rd pty plttf E. Rene Frank (Frank) for order permitting to add Interboden A.G. as an add'l 3rd pty deft.
5-23-74	Filed affidavit by Stanley Zwillinger in opposition to defts. motion
7-3-74	Filed deft. & 3rd pty plttf Notice of Motion & supporting affidavit RE: withdraw as atty. ret. 7-9-74
7-8-74	Filed affidavit by Gary P. Rosenthal in response to the application of Newman, Aronson & Neumann to withdraw as counsel to deft & 3rd pty plttf E.R. Frank
7-24-74	Filed Memo. End. on motion dtd 7-3-74. Motion granted (deft. & 3rd pty plttf is directed to retain new counsel within 20 days, plttf & 3rd pty deft may proceed with the prosecution of their claims & counterclaims in the event thereof no new counsel, Ward J. (mailed notice)
8-18-74	Filed plttf & 3rd pty dft's affdvt & notice of motion to dismiss Ret. 9-21-74
10-8-74	Filed memo endorsed on Show Cause Order filed 5-15-74 motion denied as moot. So Ordered -- Ward J.
10-8-74	Filed memo endorsed on motion filed 9-18-74 -- motion granted No opposition. Settle order & judgment on notice -- Ward, J.
10-18-74	Filed order & judgment #14,823. Ordered motion in all respects granted. Ordered that the newer affirmative defenses, counter claims & 3rd pty complaint interposed by E. Rene Frank the deft & 3rd pty plttf are hereby dismissed on the merits & with prejudice; & that plttf do recover of E. Rene Frank deft & 3rd pty plttf the sum of \$160,692 with interest thereon as indicated & that the foregoing is without prejudice to plttf's right to seek at the appropriate time a determination of amts due it from deet & 3rd pty plttf under the Guaranty Agreement dtd 5-1-71 for years 1975 & 1976 as set foth in the 4th Cause of Action of the amended complaint, etc

DOCKET SHEET ENTRIES

<u>Date</u>	<u>Proceedings</u>
	and the balance of the action is transferred to the Suspense Calendar of this Court Ward J. Judgment entered 10-18-74. Clerk. Entered 10-21-74 (mailed notice)
11-1-74	Filed plttfs. notice of deposition of E. Rene Frank on 11-18-74
11-1-74	File true copy of judgment #74,823 filed on 10-18-74
11-6-74	Filed Bill of Costs and tapes to the sum of \$181.75 docketed on Judgt #74,823 in favor of plttf as against deft. 3rd pty plttf & added to judgt clerk.
1-15-75	Filed order that E. Rene Frank deft - judgment debtor is directed to appear for examination on 1-28-75 in room 601 at 11:00 A.M. & failure to appear will subject deft. judgment debtor penalties for contempt or court & arrest. Ward J. (mailed notice)
1-24-75	Filed true copy of Order filed 1-15-75 with affidavit of service
2-5-75	Filed Order to Show Cause to Adjudg. deft in contempt ret. 2-14-75 Ward J.
2-20-75	Filed deft & 3rd pty plttf notice of appearance
3-5-75	Filed deft & 3rd pty plttf's affidavit & notice of cross- motion for an order vacating the judgment by default ret. 3-11-75
3-5-75	Filed deft's affidavit on opposition to punish him for contempt.
3-5-75	Filed deft. & 3rd pty plttf's memorandum of law in opposition to the motion to punish him for contempt & in support of his cross motion to vacate the default judgment against him
3-19-75	Filed plttf's supplemental affidavit in opposition to deft's motion to vacate default judgment, and in support of motion to have deft held in contempt
3-19-75	Filed plttf's memorandum of law in opposition to deft's motion to vacate judgment and in support of its motion to adjudge deft in contempt
4-1-75	Filed deft's reply affidavit in support of motion to open default judgment
4-1-75	Filed deft's reply memorandum of law in support of motion to open default judgment
7-21-75	Filed Memo. end. on motion dtd 2-5-75. Motion denied on condition that deft appear for examination at room 601 U.S. Courthouse within 60 days of this decision. deft. shall appear for examination at 10:00 A.M. & shall give 5 days notice to pltrfs attys of date of his appearance Settle order on notice. Ward J. (mailed notice)

A-4-A-5

DOCKET SHEET ENTRIES

<u>Date</u>	<u>Proceedings</u>
7-21-75	Filed memo. end. on motion dtd 3-5-75. Accordingly in the exercise of its discretion the court denies defts motion Ward J. (mailed notice)
7-28-75	Filed true copy of order dtd 7-21-75 with notice of entry
8-4-75	Filed order with notice of settlement. Ordered pltffs motion to adjudge deft in contempt is denied on condition deft. appear for deposition within 60 days of Court's decision of 7-21-75 & deft shall give 5 days notice to pltffs attys of his appearance. Ward j. (mailed notice)
8-12-75	Filed defts notice of appeal from the order entered 7-21-75 dismissing defts cross motion to vacate the judgment by default entered against him on 10-28-74 (mailed notice)
8-14-75	Filed true copy of order filed 8-4-75 with affidavit of service

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ALLENTOWN OFFICE BUILDING CO.,

Plaintiff,

-against-

E. RENE FRANK,

Defendant.

NOTICE OF APPEAL

73 CIV 1923
RJW

-----X
S I R S :

PLEASE TAKE NOTICE that the undersigned hereby appeals to the UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT from the orders of the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (WARD, J.) entered the 21st day of July, 1975 dismissing defendant's cross-motion to vacate the judgment by default entered against him on the 28th day of October, 1974 and granting plaintiff's motion to punish defendant for contempt, but only to the extent of requiring that he appear for a deposition in aid of enforcement of the judgment rendered against him within sixty days of the Court's decision of July 21, 1975 and on five days' notice to plaintiff's attorneys of the date of his appearance.

Dated: Forest Hills, New York
August 6th, 1975.

A7

Yours, etc.

BERNARD HIRSCHHORN
Attorney for Defendant
Office & P.O. Address
108-18 Queens Boulevard
Forest Hills, New York 11375
793-5040

TO:

CLERK OF UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
FOLEY SQUARE
NEW YORK, NEW YORK 10007

HAVENS, WANDLESS, STITT & TIGHE, Esqs.
Attorneys for Plaintiff
99 park Avenue
New York, New York 10016
986-5550

ORDER APPEALED FROM DISMISSING CROSS-MOTION

Index No. 1923 Year 19 73
UNITES STATES DISTRICT COURT
SOUTHERN DISTRICT

ALLENTOWN OFFICE BUILDING CO.,
Plaintiff,

-against-

E. RENE FRANK,
Defendant and
Third-Party Plaintiff,

-against-

HALYNA SAWYNA,
Third-Party Defendant.

NOTICE OF CROSS-MOTION

BERNARD HIRSCHHORN

Attorney for Defendant

Office and Post Office Address, Telephone

108-18 Queens Boulevard

Borough of Queens Forest Hills, N. Y. 11375
(212) 793-5040

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

It is ordered that the defendant, E. Rene Frank, be and he is hereby ordered to show cause for his default, and to move for judgment on his defenses. *Howe v. Williams*, 429 F.2d 1364 (10th Cir., 1970); *Yach v. Bank*, 494 F.2d 4 (9th Cir., 1969).

Defendant has shown nothing. E. Rene Frank is required that the settlement discussion which defendant relied, constituted as sufficient reason for his default, and that he is hereby ordered to allege facts demonstrating a meritorious defense to the claims which form the basis for the judgment.

However, despite written notice both before and after the entry of judgment on October 12, 1974, defendant did not move to vacate the judgment until January 28, 1975, and for that reason is in default.

Accordingly, in the exercise of its discretion, the Court is hereby ordering that the judgment be affirmed.

Robert J. Weiss
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALL-ENTOWN OFFICE BUILDING CO.,

Plaintiff-
Judgment Creditor

-against-

E. RENE FRANK,

Defendant-
Judgment Debtor

ORDER TO SHOW CAUSE,

AFFIDAVIT AND EXHIBITS

HAVENS, WANDLESS, STITT & TIGHE

Attorneys for

Office and Post Office Address: Telephone

99 Park Avenue

Borough of Manhattan New York, N. Y. 10016

986-5550

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

ORDER APPEALED FROM DENYING MOTION TO PUNISH APPELLANT FOR
CONTEMPT ON CONDITION HE APPEAR FOR DEPOSITION

A9

July 21, 1975

Motion denied on condition that defendant appear
for examination at Room 601, United States Courthouse, Foley
Square, New York, New York 10007, within sixty days of
the date of this decision. Defendant shall appear for
examination at 10:00 A.M. and shall give five days notice
to plaintiff's attorney of the date of his appearance.
With order on notice.

Robert F. Wand
U.S. District Court

AMENDED COMPLAINT (Filed June 27, 1973) A10
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff

against

E. RENE FRANK,

Defendant

RJW
73 CIV. 1923

AMENDED
COMPLAINT

S.U. OF N.Y.

FILED
U.S. DISTRICT COURT
JUN 27 1973
PH 113

Plaintiff, by its attorneys, Havens, Wandless, Sitt & Tighe, complaining of defendant, respectfully shows to this Court and alleges as follows:

1. That at all times hereinafter mentioned, plaintiff was, and still is, a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and maintains, and continues to maintain, its principal place of business in the City of Allentown, Commonwealth of Pennsylvania.

2. Upon information and belief, at all times hereinafter mentioned, defendant was, and still is, a citizen and resident of the Borough of Manhattan, County, City and State of New York.

3. That at all times hereinafter mentioned, defendant committed tortious acts and transacted business complained of in the Borough of Manhattan and within the territorial jurisdiction of this Court.

4. That the jurisdiction of this Court is founded upon diversity of citizenship, pursuant to §1332, Title 28 United States Code, and the matter in controversy, exclusive of interest and costs, exceeds the sum of \$10,000.

5. That effective May 1, 1971, plaintiff was, and still is the owner in fee of a certain office building, and the realty upon which the same is located, known as the "Center Square Building", located at 11 North Seventh Street, City of Allentown, Commonwealth of Pennsylvania.

6. That at all relevant times on or about prior to May 1, 1971, defendant was a general partner in a New York partnership known as Allentown Office Center Associates (hereinafter the "Partnership"), which, prior to the sale thereof to plaintiff as hereinafter more fully described, owned the aforesaid "Center Square Building".

COUNT I

7. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "1." through "6." inclusive of the complaint, with the same force and effect as if the same were hereinafter more fully set forth in the complaint.

8. In 1971, and at various times on or about prior to May 1, 1971, defendant, for the purpose of inducing plaintiff to purchase the "Center Square Building", made the following representations to the plaintiff in, among other places, the Borough of Manhattan, County, City and State of New York:

(a) that defendant was personally an international consultant in real estate matters and was expert at the business of operating and managing commercial and other real estate properties for others;

(b) that all of the space in the "Center Square Building" was either rented or leases were about to be executed for the remaining available space;

(c) that the "Center Square Building" provided substantial net profits with a positive cash flow sufficient to cover all of its indebtedness, including the indebtedness which was to be created under the terms of a certain purchase agreement, dated June 26, 1970 (hereinafter the "Purchase Agreement"), pursuant to which plaintiff acquired the subject building;

(d) that the "Center Square Building" was well maintained, in a good state of repair, and not in need of any renovation and, furthermore, that any repainting or other decoration required would be promptly made and paid for by the defendant; and

(e) that defendant would personally supervise the management of the "Center Square Building" for a period of five years, commencing May 1, 1971 and expiring April 30, 1976, and perform and discharge his duties in good faith, with diligence, and in accordance with the terms and conditions contained in a certain management agreement (hereinafter the "Management Agreement") between the parties, dated May 1, 1971, a copy of which is annexed hereto, made a part hereof, and designated Exhibit A.

9. That plaintiff, in reliance upon defendant's aforesaid representations, was thereby induced, effective on or about May 1, 1971, to purchase the said "Center Square Building" and acquired title thereto from the Partnership (of which defendant was, as previously described, a general partner) for a total consideration of \$1,100,000, of which \$725,000 was paid to the Partnership and the balance was paid to a third party (a corporation which had entered into the Purchase Agreement and had assigned its rights and obligations thereunder to plaintiff on or about May 1, 1971). That at

all relevant times, plaintiff believed and relied upon the truthfulness of defendant's aforesaid representations and would not have made the said purchase but for said representations.

10. The aforesaid representations made by defendant to plaintiff in or prior to May, 1971, were false and untrue in material respects and were known, when made, to be false and untrue by defendant in that, among other things, defendant had little or no experience as an "international consultant" in real estate matters and was neither "expert" nor competent in the business of managing commercial real estate; that at the time the "Center Square Building" was purchased by plaintiff, in truth and in fact, the space therein was not all rented or about to be rented but a number of leases either had not yet been consummated or, in fact, were consummated upon terms and conditions different from those represented by defendant; that the "Center Square Building" was not, in truth and in fact, operating on a profitable basis, did not generate a positive cash flow, and, indeed, plaintiff was required, on various occasions, to expend large sums of money to make up for deficiencies in the operation of such building; that contrary to defendant's representations, in truth and in fact the building required substantial renovation for electrical, plumbing, decorating and the like and, in connection therewith, plaintiff was required to make substantial cash expenditures for the same; and, among other things, defendant never personally supervised or managed the "Center Square Building" and, as a result, plaintiff was forced and obliged to employ another managing agent and additionally to engage its counsel to perform services in connection with the management of such building.

ing in order to prevent, among other things, defaults in various mortgages and in the payment of operating expenses and to prevent the building from falling into a state of disrepair.

11. That plaintiff duly performed all of the terms and conditions of the aforesaid agreements on its part to be performed.

12. That in the summer of 1971, plaintiff discovered the falsity of defendant's representations and duly demanded that he perform his contractual obligations and reimburse plaintiff for the losses it sustained as a result of his fraudulent acts, which demand was refused by defendant.

13. That as a result of the foregoing, plaintiff is entitled to recover damages from defendant in the sum of \$350,000, with interest from May 1, 1971.

COUNT III

14. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "1." through "6." inclusive of the complaint, with the same force and effect as if the same were more fully set forth at length.

15. That in connection with the plaintiff's purchase of the "Center Square Building" from the Partnership, effective on or about May 1, 1971, plaintiff entered into the Management Agreement with defendant and a certain Guaranty (hereinafter the "Guaranty"), dated May 1, 1971, a copy of which is also annexed hereto, made a part hereof, and designated Exhibit B.

16. That among other things, under the Guaranty defendant was obligated and required to make certain monthly payments to plaintiff and under the Management Agreement defendant was author-

ized, obligated and required (a) to collect, as agent for plaintiff, all rentals due from tenants and from users or lessees of other facilities in the "Center Square Building"; (b) to deposit and place the aforesaid sums so collected in a special custodial account to be maintained by defendant as agent for plaintiff; (c) to make due and periodic accountings of all such funds so collected to plaintiff; (d) to disburse on a regular, prompt and punctual basis all payments required to be made to the First National Bank of Allentown (the "Allentown Bank") on account of mortgages which it held on the "Center Square Building", including any amounts payable for premium charges under insurance contracts, ground rents, if any, taxes and assessments, amortization of principal and interest on said mortgages, and all sums due and payable as operating expenses such as payment of electrical bills, janitorial services and the like; and (e) to pay out to plaintiff from said custodial account the amount of funds remaining after deduction of the aforesaid operating expenses and mortgage payments.

17. That in breach of his assigned and designated duties under the Management Agreement and in violation of his Guaranty, defendant failed to perform, among other things, the aforesaid requirements and duties imposed upon him thereunder by, among other things, failing to make payments to plaintiff, failing to make principal payments due under the mortgages held by the Allentown Bank for, inter alia, the months of June and July, 1971, and failing to make payments on a prompt and punctual basis of the bills incurred in connection with the operation of the "Center Square Building" both prior and subsequent to May 1, 1971.

18. That plaintiff duly demanded that defendant make the required payments and otherwise duly perform under the Management Agreement and his personal Guaranty, which such demands have been continuously ignored and refused by defendant, who has paid no part of his obligations due and owing to plaintiff.

19. That by reason of the foregoing breaches of contract under the Management Agreement and defendant's personal Guaranty, plaintiff has been obliged to incur and expend substantial sums of money and incurred other debts and liabilities, all to its loss, in the sum of \$350,000.

20. That as a result of the foregoing, plaintiff is entitled to recover damages from defendant in the sum of \$350,000, together with interest thereon from May 1, 1971.

COUNT III

21. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "1." through "19." inclusive of the complaint, with the same force and effect as if the same were hereinafter more fully set forth at length.

22. That in or about July, 1971, plaintiff, pursuant to the written agreements between the parties, and for good cause, terminated the aforesaid Management Agreement in writing. That at the time of such termination, defendant had retained the sum of \$11,940 which he had received from the account of plaintiff as managing agent for rentals and other income, net of expenses paid by him.

23. That at all relevant times, plaintiff was the owner of such sum and entitled to immediate possession of such sum of \$11,940, which said sum defendant wrongfully, maliciously and im-

properly converted, misappropriated, detained and kept for his own personal uses and devices.

24. That plaintiff has made due and proper demand upon defendant to return the aforesaid sum of \$11,940, together with interest thereon, but defendant has refused to return or pay over to plaintiff any part of such sum.

25. That as a result of the foregoing, plaintiff is entitled to recover damages from defendant in the sum of \$11,940, together with interest thereon from July 1, 1971.

COUNT IV

26. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "1." through "6.", "9." and "10.", and "15." through "19." inclusive of the complaint with the same force and effect as if the same were hereinafter fully set forth at length.

27. That under the terms of the personal written Guarantee delivered by defendant to plaintiff, among other things, defendant guaranteed that plaintiff would receive from the rental operation of the "Center Square Building" a net income (hereinafter "Net Annual Income"), after deduction of all operating expenses and mortgage payments due to the Allentown Bank equal to not less than \$70,000 per annum for each of the five years beginning May 1, 1971 through April 30, 1976. It was further provided under such Guarantee that in the event the Net Annual Income in any agreement year was less than \$70,000, defendant would make payment on the 15th day of May following each such agreement year, of a sum equal to \$70,000, less the Net Annual Income actually received by plaintiff from the

"Center Square Building" during the preceding agreement year.

28. At the end of the first agreement year on April 30, 1972, the "Center Square Building" had not realized any Net Annual Income whatsoever and, in fact, had suffered a net loss of \$1,465 as a result of which defendant, pursuant to the terms of his writ Guaranty, was obligated to pay plaintiff a total of \$71,465 on or before May 15, 1972.

29. That plaintiff has duly performed all of the terms and conditions on its part to be performed under the Purchase Agreement, Management Agreement and under the terms of the personal Guaranty of defendant and has made due and proper demand upon defendant to make prompt payment to it of the aforesaid sum of \$71,465, and such demand defendant has refused, and continues to so refuse.

30. That defendant has not made payment to plaintiff of any part of the \$71,465 now due and owing and, upon information and belief, in each of the remaining four agreement years, except on April 30, 1976, the "Center Square Building" will earn no net income, all to the additional damage of plaintiff in the sum of \$285,920.

31. That as a result of the foregoing, plaintiff is entitled to recover damages from defendant in the sum of \$351,465, with interest thereon from May 15, 1972.

WHEREFORE, plaintiff demands judgment against defendant as follows:

(a) On Count I in the sum of \$350,000, together with interest thereon from May 1, 1971;

(b) On Count II, damages in the sum of \$350,000, together with interest thereon from May 1, 1971;

(c) On Count III, damages in the sum of \$11,940, with interest thereon from July 1, 1971;

(d) On Count IV, damages against defendant in the sum of \$351,465, with interest thereon from May 15, 1972;

(e) That punitive damages be assessed against defendant in the sum of \$500,000; and

(f) That the Court award plaintiff such other and further relief as may be just and proper, altogether with the costs and disbursements of this action.

Dated: New York, N. Y.
April 18, 1973

Yours, etc.

HAVENS, WANDLESS, STITT & TIGHE

By: 

Member of the Firm
Attorneys for Plaintiff
99 Park Avenue
New York, N. Y. 10016
212-986-5550

AMENDED ANSWER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLETOWN OFFICE BUILDING CO.,
Plaintiff,

Index No. 73-CIV. 1923

- against -

E. RENE FRANK,

Defendant.

AMENDED ANSWER

SIRS:

PLEASE TAKE NOTICE, that the defendant, E. RENE FRANK, by his attorneys NEWMAN, ARONSON & NEUMANN, answers the amended complaint as follows:

1. Denies that he has knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "1" and "5" of the amended complaint.
2. Denies each and every allegation contained in paragraph "3" of the amended complaint.

ANSWERING COUNT 1

3. Repeats, reiterates and realleges each and every admission and denial with respect to the allegations contained in paragraphs "1" through "6" inclusive as realleged in paragraph "7" of the amended complaint.

4. Denies each and every allegation contained in paragraph "8" including the sub-paragraphs thereof, except admits that on or about May 1, 1971 a certain agreement was entered into between plaintiff and defendant and defendant begs leave to refer to the original agreement for the true and exact terms thereof.

5. Denies each and every allegation contained in paragraph "9" of the amended complaint except admits that

A21

on or about May 1, 1971 Plaintiff or its nominee acquired title to the "Center Square Building". Defendant denies knowledge and information sufficient to form a belief as to whether any sums were paid to any third party and as to any assignment of any rights to any third party.

6. Denies each and every allegation contained in paragraph "10" of the amended complaint except admits that as of May 1, 1971 all of the space of the "Center Square Building" was not rented.

7. Denies each and every allegation contained in paragraphs "11", "12" and "13" of the amended complaint.

ANSWERING COUNT 11
(Incorrectly denoted in the Amended
Complaint as Count 111)

8. Repeats, reiterates and realleges each and every admission and denial with respect to the allegations contained in paragraphs "1" through "6" inclusive as realleged in paragraph "14" of the amended complaint.

9. Denies each and every allegation contained in paragraphs "15" and "16" of the amended complaint except admits that on or about May 1, 1971 plaintiff and defendant entered into two agreements and defendant begs leave to refer to the original agreements for the true and complete terms thereof.

10. Denies each and every allegation contained in paragraphs "17", "18", "19" and "20" of the amended complaint.

ANSWERING COUNT 111

11. Repeats, reiterates and realleges each and every admission and denial with respect to the allegations contained in paragraphs "1" through "19" inclusive as realleged in paragraph "21" of the amended complaint.

12. Denies each and every allegation contained in paragraphs "22", "23", "24" and "25" of the amended complaint.

ANSWERING COUNT 1V

13. Repeats, reiterates and realleges each and every admission and denial with respect to the allegations

contained in paragraphs "1" through "6", "8", "9", "10", "15" through "19" as realleged in paragraph "26" of the amended complaint.

14. Denies each and every allegations contained in paragraph "27" of the amended complaint except that defendant begs leave to refer to the original agreement for the true and complete terms thereof.

15. Denies that he has knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "28" of the amended complaint except denies that he was or is obligated to pay plaintiff any sums whatsoever as alleged therein.

16. Denies each and every allegation contained in paragraphs "29" and "31" of the amended complaint.

17. Denies that there are any sums now due and owing to the plaintiff as alleged in paragraph "30" of the amended complaint and denies that he has knowledge or information sufficient to form a belief as to each and every allegation contained in said paragraph except admits that payment has been made to the plaintiff.

FIRST SEPARATE AND
COMPLETE DEFENSE

18. Paragraph "17" of the contract of sale of said premises pursuant to which defendant conveyed title to the subject building states as follows: "The Purchaser represents to the Seller that the Purchaser has examined the premises and that the Purchaser is fully satisfied with the physical condition thereof and that neither the Seller nor any agent or representative of the Seller has made any representation regarding the condition thereof, or tenancy affecting the same, or regarding any other matter or thing except as expressly set forth in this agreement and the schedule annexed hereto."

19. Annexed hereto as Exhibit "A" is a copy of a schedule annexed to the contract of sale setting forth the information regarding ^{then} existing tenancies of the "Center Square Building".

20. Said contract of sale contains no representations;

(a) that defendant was personally an international consultant in real estate matters and was expert at the business of operating and managing commercial and other real estate properties for others;

(b) that all of the space in the "Center Square Building" was either rented or leases were about to be executed for the remaining available space;

(c) that the "Center Square Building" provided substantial net profits with a positive cash flow sufficient to cover all of its indebtedness, including the indebtedness which was to be created under the terms of a certain purchase agreement, dated June 26, 1970 (hereinafter the "Purchase Agreement"), pursuant to which plaintiff acquired the subject building;

(d) that the "Center Square Building" was well maintained, in a good state of repair, and not in need of any renovation and, furthermore, that any repainting or decoration required would be promptly made and paid for by the defendant; and

(e) that defendant would personally supervise the management of the "Center Square Building" for a period of five years, commencing May 1, 1971 and expiring April 30, 1976.

SECOND SEPARATE AND
COMPLETE DEFENSE

21. Paragraph "14" of the said contract of sale states as follows: "14... The acceptance of a deed by the Purchaser shall be deemed to be a full performance and discharge of every agreement and obligation on the part of the Seller to be performed pursuant to the provisions of this

A24
agreement, except those, if any, which are herein specifically stated to survive the delivery of the deed..."

THIRD SEPARATE AND
COMPLETE DEFENSE

22. Any and all loss incurred and to be incurred by the plaintiff as the result of the operation of the "Center Square Building" as alleged in the Amended Complaint has been incurred and will be incurred solely by reason of the mismanagement of the said premises by the plaintiff and/or its agents.

FOURTH SEPARATE AND
COMPLETE DEFENSE

23. Pursuant to an agreement between plaintiff and the defendant dated May 1, 1971 whereby defendant was retained by the plaintiff to manage the "Center Square Building" and defendant was permitted to hire in his own name all managerial personnel necessary for the efficient discharge of his duties, the defendant in or about May, 1971 entered into an agreement with one, HALYNA SAWYNA, whereby the said HALYNA SAWYNA was to act as the defendant's management representative with regard to the said premises. The duties of the said HALYNA SAWYNA, among other things, included the collection of rent for the account of the plaintiff and the rendering of monthly reports and statements to the defendant.

24. Upon information and belief, in or about July, 1971 plaintiff, with knowledge of the employment of the said HALYNA SAWYNA by the defendant, willfully enticed and procured the said HALYNA SAWYNA to leave the employment of the defendant and thereafter commenced the employment of the said HALYNA SAWYNA as the agent of the plaintiff and instructed her, among other things, to cease rendering reports and statements to the defendant and to no longer provide the defendant with any other information concerning the management of the said premises.

25. Defendant thereafter after being advised thereby by the said HALYNA SAWYNA terminated his employment of her.

26. By reason of the foregoing and the complete control of the actions of the said HALYNA SAWYNA by the plaintiff, plaintiff commenced to operate, manage and control the said premises through HALYNA SAWYNA whom plaintiff made its own agent and/or employee and defendant was prevented from performing his obligations under the said agreement.

27. Any sums of money collected as rent by the said HALYNA SAWYNA was, therefore, collected by her as an agent or employee of the plaintiff.

FIFTH SEPARATE AND COMPLETE DEFENSE
AND FIRST COUNTERCLAIM

28. Defendant repeats and realleges each and every allegation of paragraphs "23" through "27" of this Amended Answer with the same force and effect as though fully set forth herein at length.

29. Notwithstanding the fact that the plaintiff had due notice and knowledge of the aforesaid employment agreement between the defendant and HALYNA SAWYNA, the plaintiff wrongfully, knowingly, intentionally, maliciously and without reasonable justification or excuse induced, persuaded and enticed the said HALYNA SAWYNA to violate, repudiate and break the said agreement with the defendant and to refuse to proceed further thereunder.

30. By reason of the foregoing actions of the plaintiff, the defendant was unable to perform its agreement with the plaintiff and has been damaged in the sum of \$25,000.00.

SIXTH SEPARATE AND COMPLETE
DEFENSE AND SECOND COUNTERCLAIM

31. Defendant repeats and realleges each and every allegation of paragraphs "23" through "27" and "29" of this Amended Answer with the same force and effect as though fully set forth herein at length. 6 -

37. By reason of the foregoing, plaintiff breached the afore-said agreement with the defendant thereby resulting in damages to the defendant in the sum of \$25,000.00.

WHEREFORE defendant demands judgment:

- (a) dismissing the Amended Complaint herein;
- (b) on his first counterclaim damages in the sum of \$25,000.00 against the plaintiff together with interest from July 1, 1971;
- (c) on the second counterclaim damages in the sum of \$25,000.00 against the plaintiff together with interest from July 1, 1971;
- (d) that punitive damages be assessed against the plaintiff in the sum of \$100,000.00;
- (e) that the Court award plaintiff such other and further relief that may be just and proper;

together with the costs and disbursements of this action.

Dated: New York, N. Y.

August 24, 1973

NEWMAN, ARONSON & NEUMANN

By: 

Edwin Ostrow
Member of the Firm
Attorneys for Defendant
350 Fifth Avenue
New York, N. Y. 10001
212-695-5575

NOTICE OF SETTLEMENT

A27

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff

73 CIV. 1923/73

(RJW)

against

E. RENE FRANK,

NOTICE OF
SETTLEMENT

Defendant and
Third-Party
Plaintiff

against

HALYNA SAWYNA,

Third-Party
Defendant

S I R S :

PLEASE TAKE NOTICE that a proposed Order and Judgment of which the within is a true copy will be presented for settlement to the Hon. Robert J. Ward, one of the judges of the within named Court, in Room **7**, United States District Court, Foley Square, New York, New York, on October **17**, 1974 at **10:00 A.M.**

Dated: New York, N. Y.
October **9**, 1974

Yours, etc.,

HAVENS, WANDLESS, STITT & TIGHE

By 

A Member of the Firm

Attorneys for Plaintiff and
Third-Party Defendant

Office and P.O. Address

99 Park Avenue

New York, N.Y. 10016

212-986-5550

To: E. RENE FRANK
Defendant and Third-
Party Plaintiff
Avenue Ricardo Soriano 12
Marbella (Malaga)
Spain

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff

73 CIV. 1923/73
(RJW)

against

E. RENE FRANK,

ORDER AND JUDGMENT

Defendant and
Third-Party
Plaintiff

against

HALYNA SAWYNA,

Third-Party
defendant

Plaintiff and third-party defendant having moved this Court for an Order striking the Answer, dismissing the counterclaims and dismissing the third-party claim interposed by defendant and third-party plaintiff and for a judgment in favor of plaintiff and against said defendant and third-party plaintiff, upon the ground that the said defendant and third-party plaintiff has defaulted in entering an appearance as required by an Order of this Court dated July 23, 1974, and this Motion having regularly come on to be heard;

Now, upon reading and filing the Summons and Amended Complaint with proof of personal service thereof, the Amended Answer with counterclaims, the reply to counterclaims, the third-party Summons and Complaint, the Answer to the third-party

Complaint, and upon reading and filing the Notice of the aforesaid Motion dated September 16, 1974, the affidavit of David G. Taylor, sworn to the 16th day of September 1974, the exhibits annexed thereto, the affidavit of Steven A. Kriegsman, sworn to the 16th day of September 1974, with proof of due and timely service of all the foregoing upon defendant and third-party plaintiff, all submitted in support of said Motion, and defendant and third-party plaintiff having failed to submit answering papers or otherwise oppose said Motion, and said Motion having been duly submitted before the Hon. Robert J. Ward, United States District Judge for the Southern District of New York, and due deliberations having been had, and the decision of the Court having been read and filed, and it being expressly determined that there is no just reason for delay and expressly directed that final judgment be entered as hereinafter set forth.

Now, on motion of Havens, Wanders, Stitt & Tighe, attorneys for plaintiff and third-party defendant, it is:

ORDERED, ADJUDGED AND DECREED

1. That the aforesaid Motion be and the same hereby is in all respects granted;
2. That the Answer, affirmative defenses, counter-claims and the Third-Party Complaint interposed by E. Rene Frank, the defendant and third-party plaintiff, are hereby dismissed on the merits and with prejudice;
3. That Allentown Office Building Co., the plaintiff, a Pennsylvania corporation with its principal office at the Center Square Building, Allentown, Pennsylvania, do recover of E. Rene Frank, the defendant and third-party plaintiff, with a last known address at Avenue Ricardo

Soriano 12, Marbella (Malaga), Spain, the sum of \$160,692 with interest thereon as follows:

on \$11,940 at 7-1/2% from May 1, 1971 to August 31, 1972 in the sum of \$1,194.00

on \$11,940 at 6% from September 1, 1972 in the sum of \$1,533.55

on \$71,465 at 7-1/2% from May 1, 1972 to August 31, 1972 in the sum of \$1,786.62

on \$71,465 at 6% from September 1, 1972 in the sum of \$9,179.15

on \$38,824 from May 1, 1973 in the sum of \$3,435.01

on \$38,463 from May 1, 1974 in the sum of \$1,093.82

for total interest of \$18,224.15 and \$ costs and disbursements as taxed by the Clerk, amounting in all to the sum of \$ and that plaintiff have execution therefor;

4. That the foregoing is without prejudice to plaintiff's right to seek, at the appropriate time a determination of amounts due it from defendant and third-party plaintiff under the Guaranty Agreement dated May 1, 1971, for years 1975 and 1976 as set forth in the fourth Cause of Action of the Amended Complaint, which said claims are hereby severed.

Dated: New York, New York
October , 1974

United States District Judge

JUDGMENT ENTERED:

Clerk

Check Applicable Box



Attorney's
Affirmation

shows: deponent is

PROOF OF SERVICE

A31

the attorney(s) of record for

in the within action; deponent has read the foregoing

and knows the contents thereof; the same is

true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

SS.:

being duly sworn, deposes and says: deponent is

in the within action; deponent has read

and knows the contents thereof; the same is true to

and knows the contents thereof; the same is true to

the foregoing
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as

Check Applicable Box



Individual
Verification

the



Corporate
Verification

the
a
corporation,

foregoing
is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because
is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

with-Notice of Settlement

ELLEN E. NELSON,

being duly sworn, deposes and says: deponent is not a party to the action,

is over 18 years of age and resides at 2989 Marion Avenue, Bronx, New York 10455



Affidavit
of Service
By Mail

On October 9,

1974

deponent served the within proposed Order and Judgment/

upon E. RENE FRANK

Third-Party Plaintiff

attorney(s) for Defendant and/ in this action, Avenue Ricardo Soriano 12, Marbella
(Malaga) Spain (defendant's last known address)

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office — official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Check Applicable Box



Affidavit
of Personal
Service

On

19

at

upon

deponent served the within

the

herein, by delivering a true copy thereof to h

personally. Deponent knew the

person so served to be the person mentioned and described in said papers as the

therein.

Sworn to before me on

October 10 1974

Ellen E. Nelson

The name signed must be printed beneath

ELLEN E. NELSON

Gary P. Rosenthal

GARY P. ROSENTHAL
Notary Public, State of New York
No. 03255605
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1975

NOTICE OF ENTRY

Please take notice that the within is a (certified) copy of a n ORDER AND JUDGMENT entered in the office of the clerk of the within court on October 18, 1974

A321
October 30, 1974.

Yours, etc.,

WENS, WANDLESS, STITT & TICHE

Attorneys for Plaintiff

Office and Post Office Address

99 Park Avenue

City of Manhattan New York, N. Y. 10016

E. RENE FRANK

Avenue Ricardo Soriano 12

Marbella (Malaga) Spain

NOTICE OF SETTLEMENT

Please take notice that an order

which the within is a true copy will be presented to the Hon.

of the judges of the within named Court, at

day of 19

M.

Yours, etc.,

WENS, WANDLESS, STITT & TICHE

Attorneys for

Office and Post Office Address

99 Park Avenue

City of Manhattan New York, N. Y. 10016

Index No. 73 COV.1923/73 Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLENTOWN OFFICE BUILDING CO.,
Plaintiff,

-against-

E. RENE FRANK,

Defendant and
Third-Party
Plaintiff,

-against-

HALYNA SAWYNA,

Third-Party
Defendant.

ORDER AND JUDGMENT

with

NOTICE OF ENTRY

HAVENS, WANDLESS, STITT & TICHE
Attorneys for Plaintiff

Office and Post Office Address, Telephone

99 Park Avenue

Borough of Manhattan New York, N. Y. 10016

986-5550

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

ORDER AND JUDGMENT (Filed October 18, 1974)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A33

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff

73 CIV. 1923/73
(RJW)

against

E. RENE FRANK,

ORDER AND JUDGMENT

Defendant and
Third-Party
Plaintiff

against

HALYNA SAWYNA,

Third-Party
defendant

Plaintiff and third-party defendant having moved this Court for an Order striking the Answer, dismissing the counterclaims and dismissing the third-party claim interposed by defendant and third-party plaintiff and for a judgment in favor of plaintiff and against said defendant and third-party plaintiff, upon the ground that the said defendant and third-party plaintiff has defaulted in entering an appearance as required by an Order of this Court dated July 23, 1974, and this Motion having regularly come on to be heard;

Now, upon reading and filing the Summons and Amended Complaint with proof of personal service thereof, the Amended Answer with counterclaims, the reply to counterclaims, the third-party Summons and Complaint, the Answer to the third-party

Complaint, and upon reading and filing the Notice of the aforesaid A34
Motion dated September 16, 1974, the affidavit of David G. Taylor,
sworn to the 16th day of September 1974, the exhibits annexed
thereto, the affidavit of Steven A. Kriegsman, sworn to the 16th
day of September 1974, with proof of due and timely service of
all the foregoing upon defendant and third-party plaintiff, all
submitted in support of said Motion, and defendant and third-
party plaintiff having failed to submit answering papers or other-
wise oppose said Motion, and said Motion having been duly submit-
ted before the Hon. Robert J. Ward, United States District Judge
for the Southern District of New York, and due deliberations
having been had, and the decision of the Court having been read
and filed, and it being expressly determined that there is no just
reason for delay and expressly directed that final judgment be
entered as hereinafter set forth.

Now, on motion of Havens, Wandless, Stitt & Tighe,
attorneys for plaintiff and third-party defendant, it is:

ORDERED, ADJUDGED AND DECREED

1. That the aforesaid Motion be and the same hereby
is in all respects granted;
2. That the Answer, affirmative defenses, counter-
claims and the Third-Party Complaint interposed by
E. Rene Frank, the defendant and third-party plaintiff,
are hereby dismissed on the merits and with prejudice;
3. That Allentown Office Building Co., the plaintiff,
a Pennsylvania corporation with its principal office at
the Center Square Building, Allentown, Pennsylvania, do
recover of E. Rene Frank, the defendant and third-party
plaintiff, with a last known address at Avenue Ricardo

Soriano 12, Marbella (Malaga), Spain, the sum of \$160,692 with interest thereon as follows:

on \$11,940 at 7-1/2% from May 1, 1971 to August 31, 1972 in the sum of \$1,194.00

on \$11,940 at 6% from September 1, 1972 in the sum of \$1,533.55

on \$71,465 at 7-1/2% from May 1, 1972 to August 31, 1972 in the sum of \$1,786.62

on \$71,465 at 6% from September 1, 1972 in the sum of \$9,179.15

on \$38,824 from May 1, 1973 in the sum of \$3,435.01

on \$38,463 from May 1, 1974 in the sum of \$1,093.82

for total interest of \$18,224.15 and costs

and disbursements ^{to be} ~~as~~ taxed by the Clerk, ~~amounting in all~~ ~~to the sum of \$~~ and that plaintiff have execution therefor;

4. That the foregoing is without prejudice to plaintiff's right to seek, at the appropriate time a determination of amounts due it from defendant and third-party plaintiff under the Guaranty Agreement dated May 1, 1971, for years 1975 and 1976 as set forth in the fourth Cause of Action of the Amended Complaint,

which said claims are hereby severed *and the balance of the action is transferred to the Surplus Calendar of this Court.*
Dated: New York, New York
October 17th, 1974

Robert F. Ward
United States District Judge

JUDGMENT ENTERED:

Raymond M. Bingham
Clerk

October 18, 1974

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification
By Attorney

certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's
Affirmation

shows: deponent is

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is

true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

☐ Individual
Verification

the

being duly sworn, deposes and says: deponent is in the within action; deponent has read

the foregoing deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

and knows the contents thereof; the same is true to

☐ Corporate
Verification

the
a

of
corporation,

in the within action; deponent has read the and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

foregoing is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because

is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

ELLEN E. NELSON,

being duly sworn, deposes and says: deponent is not a party to the action,

is over 18 years of age and resides at 2989 Marion Avenue, Bronx, New York 10458.

☒

Affidavit
of Service
By Mail

On October 30, 19 74 deponent served the within

Order and Judgment with Noti

of Entry

upon E. RENE FRANK, Defendant and Third-Party Plaintiff

~~XXXXXXXXXX~~

in this action, at Avenue Ricardo Soriano 12, Marbell

(Malaga) Spain (defendant's last known address)

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐

Affidavit
of Personal
Service

On 19 at upon

deponent served the within

the

herein, by delivering a true copy thereof to h

personally. Deponent knew the

person so served to be the person mentioned and described in said papers as the

therein.

Sworn to before me on October 30, 1974

The name signed must be printed beneath

Ellen E. Nelson

GARY D. ROSENTHAL
Notary Public, State of New York
No. 63-3859405
Qualified in Bronx County
Certificate 1961 in New York County

United States District Court for the

SOUTHERN DISTRICT OF NEW YORK

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff

vs.

CIVIL ACTION FILE NO.
73 1923/73

E. RENE FRANK, et al.,

Defendant

Judgment having been entered in the above entitled action on the 18th day of
October, 1974, against E. RENE FRANK
the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk \$ 15.00

Fees of the marshal 3.00

Fees of the court reporter for all or any part of the
transcript necessarily obtained for use in the case

Fees and disbursements for printing

Fees for witnesses (itemized on reverse side)

Fees for exemplification and copies of papers
necessarily obtained for use in case

Docket fees under 28 U. S. C. 1923 20.00

Costs incident to taking of depositions 143.75

Cost as shown on Mandate of Court of Appeals
Other Costs (Please itemize)

Total \$ 181.75

State of NEW YORK
County of NEW YORK

ss:

I, GARY P. ROSENTHAL do hereby swear that the
foregoing costs are correct and were necessarily incurred in this action and that the services for which
fees have been charged were actually and necessarily performed. A copy hereof was this day mailed
to E. RENE FRANK, the defendant in the above-entitled action with postage
fully prepaid thereon.

Please take notice that I will appear before the Clerk who will tax said costs on
November 6, 1974 at 10:00 a.m.

HAVENS, WANDLESS, STITT & TIGHE

BY: Gary Rosenthal

Attorneys for

Plaintiff

Subscribed and sworn to before me this 30th day of October
at New York, New York

A. D. 19 74

DIANA DARLINGTON, Notary Public
State of New York, No. 03-5021500
Qualified in Bronx County
Cert. Filed in New York County
Commission Expires March 20, 1976

Notary Public.

Costs are hereby taxed in the amount of \$ this day
of 19 , and that amount included in the judgment.

Clerk

[illegible]

NOTICE

Section 1924, Title 28, U. S. Code (effective September 1, 1948) provides:

"Sec. 1924. Verification of bill of costs."

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 of Title 28 which reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:

Rule 54 (d)

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but cost against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

Rule 6 (c)

"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Rule 58 (In Part)

"The entry of the judgment shall not be delayed for the taxing of costs."

PROOF OF SERVICE

shows: deponent is

the attorney(s) of record for

in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

undersigned affirms that the foregoing statements are true, under the penalties of perjury.

The name signed must be printed beneath

TE OF NEW YORK, COUNTY OF

ss.:

being duly sworn, deposes and says: deponent is in the within action; deponent has read and knows the contents thereof; the same is true to

Individual Verification

the foregoing deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

Corporate Verification

the of in the within action; deponent has read the foregoing a corporation, and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

the grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

orn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

ELLEN E. NELSON

being duly sworn, deposes and says: deponent is not a party to the action,

s over 18 years of age and resides at 2989 Marion Avenue, Bronx, New York 10458

Affidavit of Service By Mail

On October 30,

19 74 deponent served the within

Bill of Costs

upon E. Rene Frank, Defendant and Third-Party Plaintiff

in this action, at Avenue Ricardo Soriano 12, Marbella

(Malaga) Spain (defendant's last known address) by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Affidavit of Personal Service

On

19

at

upon

deponent served the within

herein, by delivering a true copy thereof to h personally. Deponent knew the

person so served to be the person mentioned and described in said papers as the

Sworn to before me on October 30 1974.

The name signed must be printed beneath

Ellen E. Nelson

GARY P. ROSENTHAL
Notary Public, State of New York
No. 03-3359405
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1975

NOTICE TO TAKE DEPOSITION

A40

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

ALLENTOWN OFFICE BUILDING CO., :

Plaintiff, : Index No. 73 CIV. 1923/73
(RJW)

against :

E. RENE FRANK, : NOTICE TO TAKE DEPOSITION

Defendant and :
Third-Party
Plaintiff, :

against :

HALYNA SAWYNA, :

Third-Party :
Defendant

----- x

SIRS:

PLEASE TAKE NOTICE that at 10:00 A.M. on the 18th day of November, 1974, at the offices of Havens, Wandless, Still & Tighe, 20th Floor, 99 Park Avenue, New York, New York, the plaintiff and judgment creditor in the above entitled action will take the deposition of defendant-judgment debtor, E. RENE FRANK, with a last known address at Avenue Ricardo Soriano 12, Marbella (Malaga), Spain, pursuant to Rule 69(a), 26 and 30 of the Federal Rules of Civil Procedure, before a notary public or some other officer authorized by law to administer oaths. This examination is in aid of the judgment heretofore obtained by the said plaintiff against the above named defendant and judgment debtor. The examination will continue from day to day until completed.

PLEASE TAKE FURTHER NOTICE, that the above named individual whose deposition will be taken, is hereby notified to appear for this deposition and bring with him all the following books, papers and records in his possession, custody and control: bank accounts, bank statements, loan agreements, pledge agreements, security agreements, leases, contracts, deeds, accounts receivable, records of securities owned by judgment debtor either beneficially or of record, together with any and all correspondence, notes or memoranda relating to any assets of the judgment debtor and/or the transfer and/or disposition thereof including financial statements and tax returns for the period 1970 to date, and all other books, papers and records in his possession or control which have or may contain information concerning his property, income or other means relevant to the satisfaction of the judgment.

Dated: New York, New York
October 30, 1974

Yours, etc.,

HAVENS, WANDLESS, STITT & TIGHE

By 

A Member of the Firm
Attorneys for Plaintiff-Judgment
Creditor
99 Park Avenue
New York, New York 10016
(212) 986-5550

To: E. RENE FRANK
Defendant-Judgment Debtor
Avenue Ricardo Soriano 12
Marbella (Malaga)
Spain

I, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy. The attorney, of record in this action, deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent, not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: The undersigned affirms that the foregoing statements are true under the penalties of perjury.

OF NEW YORK COUNTY OF
being duly sworn, deposes and says: deponent in the within action, deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

OF NEW YORK COUNTY OF
ELLEN E. NELSON, being duly sworn, deposes and says: deponent is not a party to the action. 18 years of age and resides at 2989 Marion Avenue, Bronx, New York 10458. On October 30, 1974 deponent served the within Notice to take Deposition upon E. Rene Frank, Defendant and Third-Party Plaintiff, in this action, at Avenue Ricardo Soriano 12, Marbella (Malaga) Spain (defendant's last known address) by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

On 1974 at deponent served the within upon the person so served to be the person mentioned and described in said papers as the person therein, by delivering a true copy thereof to personally. Deponent knew the person so served to be the person mentioned and described in said papers as the person therein.

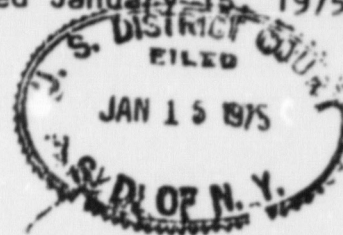
to before me on October 30, 1974

Gary P. Rosenthal

Ellen E. Nelson
The name signed must be printed beneath
Ellen E. Nelson

GARY P. ROSENTHAL
Notary Public, State of New York
No. 03-3359405
Qualified in Bronx County
Commission Expires March 30, 1975

ORDER ENTERED JANUARY 13, 1975 (Filed January 15, 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLTOWN OFFICE BUILDING CO.,

Plaintiff-
Judgment Creditor,Index No. 73 CIV.
1923/73
(RJW)

- against -

E. RENE FRANK,

ORDERDefendant-
Judgment Debtor.

Upon reading and filing the Notice to Take the Deposition upon oral examination of E. Rene Frank, defendant and judgment debtor in the above-entitled action dated October 30, 1974, in aid of the judgment heretofore obtained by the above-entitled plaintiff-judgment creditor against said defendant-judgment debtor, the affidavit of Cary F. Rosenthal, Esq., sworn to the 6th day of January, 1975, and the Exhibits annexed thereto and upon all the proceedings heretofore had herein.

NOW, upon Motion of Havens, Wandless, Stitt & Tighe, attorneys for plaintiff-judgment creditor, it is

ORDERED, that E. Rene Frank, the defendant-judgment debtor herein, do and he hereby is directed to appear in United

MICROFILM

JAN 15 1975

States District Court House for the Southern District of New York, Foley Square, New York, New York, Room 601, on January 28, 1975, at 11:00 A.M., for examination, with the books, records and papers called for in plaintiff-judgment creditor's aforesaid Notice to Take Deposition, and it is further

ORDERED, that failure of the said E. Rene Frank to appear in person for said examination as hereinabove directed will subject said defendant-judgment debtor to appropriate penalties for contempt of court and arrest, ~~and it is further~~

~~ORDERED, that said defendant-judgment debtor is hereby~~
directed to pay plaintiff-judgment creditor \$ 250.00 as and for its reasonable expenses, including attorneys' fees, caused by the unjustified failure of the said E. Rene Frank to appear ~~for the taking of his said deposition.~~

Dated: New York, New York
January 13, 1975

Robert F. Wand
United States District Judge

A45

ORDER TO SHOW CAUSE DATED JANUARY 30, 1975
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A46

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff-Judgment Creditor:

-against-

E. RENE FRANK,

Defendant-Judgment Debtor :

Index No. 73 CIV
1923/73
(RJW)

ORDER TO SHOW CAUSE

TO
APPEAL JUDGE DEFENDANT
IN CONTEMPT

-----x

Upon reading and filing the Order of this Court dated January 13, 1975, and filed January 15, 1975, with proof of service thereof upon E. Rene Frank, the defendant and judgment debtor in the above-entitled action, and upon the Affidavit of Gary P. Rosenthal, Esq., dated January 30, 1975, and it appearing that said defendant-judgment debtor failed to comply with said Order,

IT IS HEREBY ORDERED, that E. Rene Frank, the said defendant and judgment debtor herein, show cause before this Court on February 14, 1975, at 2:15 P.M. or as soon thereafter as counsel can be heard, in Room 517, United States Courthouse, Foley Square, New York, New York, before the Honorable Robert J. Ward, United States District Judge, why said defendant-judgment debtor should not be punished for contempt ^{PURS. TO LOCAL CIVIL #1} for violation of and non-compliance with said Order in that said defendant-judgment debtor failed to respond pursuant thereto and appear for a deposition upon oral examination in aid of enforcement of the judgment heretofore rendered against him; why a warrant should not issue for the arrest of said defendant-judgment debtor

why the said defendant-judgment debtor should not pay the costs of this motion, including, a reasonable attorneys fee; and why the above-entitled plaintiff-judgment creditor should not have such other and further relief as may be proper, *IT IS FURTHER ORDERED, THAT*

-Sufficient reason appearing therefor, let service of a copy of this Order and a copy of the papers on which it is granted upon E. Rene Frank at Avenue Ricardo Soriano 12, Marbella, Malaga, Spain, said defendant-judgment debtor's last known address by ^{*Registered*} Air-Mail, Special Delivery, ^{*Return Receipt Requested*} on or before the 3RD day of February, 1975, be deemed sufficient.

Dated: New York, New York
January 30TH 1975

Robert J. Ward

U. S. D. J.

AFFIDAVIT OF GARY P. ROSENTHAL
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A48

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff-Judgment Creditor, : Index No. 73 CIV.
1923/73

-against-

(RJW)

E. RENE FRANK,

AFFIDAVIT

Defendant-Judgment Debtor

-----x
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GARY P. ROSENTHAL, being duly sworn, deposes and says:

I am an attorney duly admitted to practice before this Court and am associated with the firm of Havens, Wandless, Stitt & Tighe, attorneys for Allentown Office Building Co., the plaintiff and judgment creditor in the above-entitled action. I submit this Affidavit in support of the instant application for an order directing E. Rene Frank, the above-entitled defendant-judgment debtor to show cause why an Order should not be entered holding said defendant-judgment debtor in contempt, why a warrant for said defendant-judgment debtor's arrest should not issue and why the other relief requested in the annexed Order should not be granted for said defendant-judgment debtor's failure to appear for a deposition upon oral examination in aid of enforcement of the judgment duly rendered against him by this Court.

By Order dated January 13, 1975 and filed January 15, 1975, this Court directed said defendant-judgment debtor to

appear for said examination on January 28, 1975 at 11:00 a.m. at the Courthouse, Room 601, and to bring with him the books, records and papers called for in plaintiff-judgment creditor's prior notice to take Mr. Frank's deposition, upon which notice said defendant-judgment debtor also defaulted and which said default precipitated plaintiff-judgment creditor's application for the aforesaid Order of January 13, 1975. Said Order further provided that the failure of the said defendant-judgment debtor to appear will subject him to appropriate penalties for contempt of Court and arrest. A copy of said Order with proof of service thereupon said defendant-judgment debtor and the aforesaid deposition notice are annexed hereto made a part hereof and designated Exhibits "A" and "B" respectively.

The undersigned was present at the time and place specified in said Order and the said defendant-judgment debtor did not appear and was not present. Indeed, your deponent remained at the designated place of examination for approximately an hour but Mr. Frank still did not appear. Moreover, no communication was received by your deponent or his firm either prior or subsequent to the scheduled examination nor has any excuse or explanation otherwise been offered by Mr. Frank with respect to his refusal to appear thereat.

It is respectfully submitted that the conduct of the aforesaid defendant-judgment debtor was calculated to and actually did defeat, impair, impede and prejudice the remedies of the plaintiff-judgment creditor in that plaintiff-judgment creditor has been unable to obtain information on matters relevant to the satisfaction of the judgment as authorized by law.

✓ The reason that this application is being made by way of Order to Show Cause rather than by Notice of Motion is that defendant-judgment debtor currently resides in Spain and, consequently, plaintiff-judgment creditor desires that this Court direct service upon him in the manner set forth in the annexed Order to Show Cause.

✓ No prior request for this or similar relief has been made before any other Court or Judge.

WHEREFORE, the undersigned requests that the annexed Order to Show Cause and the relief requested therein, be in all respects granted.

Gary P. Rosenthal
 Gary P. Rosenthal

Sworn to before me this

30th day of January, 1975

Dorothy R. Eaton

DOROTHY R. EATON
 Notary Public - State of New York
 No. 41-1065753 Queens County
 Cert. Filed in New York County
 Term Expires March 30, 1978

PROOF OF SERVICE

A51

C 321—Affidavit or Affirmation of Service by Mail. 12-63
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C COPYRIGHT 1963 BY JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

ALLENTOWN OFFICE BUILDING CO.

Index No. 73 Civ. 1923 (RJW)

Plaintiff -
against Judgment Creditor,

~~ATTORNEY'S AFFIRMATION~~
~~OR~~
AFFIDAVIT OF SERVICE
BY MAIL

E. RENE FRANK

Defendant -
Judgment Debtor.

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

~~The undersigned, attorney at law of the State of New York, do hereby~~
HUGH ORGIAS, being duly sworn, deposes and says: } that deponent is
employed by Havens, Wandless, Stitt & Tighe attorney(s) of record for
Plaintiff-Judgment Creditor in the above entitled action.
Deponent is not a party to the action, is over 18 years of age and resides at 740 East 95th Street,
Brooklyn, New York 11236.

That on the 31st day of January, 1975 deponent served the annexed
Order to Show Cause and Supporting Papers
on E. Rene Frank, the Defendant-Judgment Debtor

in this action, at Avenue Ricardo Soriano 12, Marbella, Malaga, Spain, the last known
address of said Defendant-Judgment Debtor, in the manner described in said
the address designated by said Order to show cause, by depositing same enclosed in a postpaid
properly addressed wrapper, in a post office — official depository under the exclusive care and custody
of the United States post office department within the State of New York, Registered, Airmail
Special Delivery, Return Receipt Requested.

Sworn to before me (Signed:)

this 31st day of January, 1975

GARY I. ROSENTHAL
Notary Public, State of New York
My Comm. Expires 12/31/75

The name signed must be printed beneath
Hugh Orgias

AFFIDAVIT OF BERNARD HIRSCHHORN IN OPPOSITION

A53

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ALLENTOWN OFFICE BUILDING CO.,
Plaintiff,

AFFIDAVIT IN OPPOSITION

-against-

E. RENE FRANK,

73 Civil Action File
No. 1923

Defendant and (Judge Robert J. Ward)
Third-Party Plaintiff,

-against-

HALYNA SAWYNA,

Third-Party Defendant.

-----X

STATE OF NEW YORK)

SS.:

COUNTY OF QUEENS)

BERNARD HIRSCHHORN, being duly sworn, deposes and
says:

1. That I am the attorney for the Defendant, E. RENE
FRANK, and submit this affidavit in opposition to the motion to
punish him for contempt.

2. A default judgment was entered against Defendant,
as the aftermath of the Order of this Court allowing counsel to
withdraw and his failure to retain new counsel or file a notice
of appearance. A cross motion has been made to vacate the
judgment. If granted, this branch of the motion will become
academic.

3. Following the default judgment, defendant was served by mail in Spain with notice to take his deposition in New York City. He did not receive the notice in time to obey it. Moreover, due process is violated by expecting him to undergo the expense of an intercontinental voyage to be examined as to his alleged assets. Finally, it is in violation of specific Federal Rules, quoted at length in deponent's brief, for a party to be served outside the State in which the District Court is located and to be called upon to appear three thousand miles from the place of service. It is also in violation of the applicable State statutes.

4. A mere examination of the affidavits of service by mail of the notice and order to appear, subsequently obtained, reveal that Defendant hardly had time to respond, assuming arguendo that it was reasonable to expect him to expend the money necessary to finance an intercontinental voyage.

5. Not only did he not receive any of the papers in time, due to the unreliable mode of service employed, but he was mislead into believing that the proceedings were being held in abeyance, pending settlement negotiations.

6. It is respectfully submitted that any default was not wilful and therefore, the drastic remedy of contempt should not be granted. It is further submitted that the mode of service upon Defendant, both in respect to place and manner, was

A55

improper.

BE HLL

BERNARD HIRSCHHORN

Sworn to before me this

28th day of February, 1975.

John H. Linder
Notary Public

CIC 42-10-10-10-10
NOTARY PUBLIC, State of New York
Notary No. 1000
Queens County
Commission Expires 12-31-79

NOTICE OF CROSS-MOTION BY APPELLANT

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF NEW YORK

-----X

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff,

-against-

E. RENE FRANK,

Defendant and
Third-Party Plaintiff,

-against-

HALYNA SAWYNA,

Third-Party Defendant.

-----X

NOTICE OF CROSS-MOTION

73 Civil Action File
No. 1923

(Judge Robert J. Ward)

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of E. RENE FRANK, sworn to the 27 day of February, 1975; the annexed affidavit of BERNARD HIRSCHHORN, ESQ., sworn to the 28 day of February, 1975, and all of the proceedings heretofore had, the undersigned will cross-move this Court in Room 519 of the United States Courthouse at Foley Square, New York City, New York before HONORABLE ROBERT J. WARD, United States District Judge, on the 11th day of March, 1975, at 2:15 in the afternoon, for an Order vacating the judgment by default in this action and for

NOTICE OF CROSS-MOTION BY APPELLANT

such other and further relief as to this Court may be deemed just and proper.

Dated: Forest Hills, New York
February 28, 1975.

Yours, etc.

BERNARD HIRSCHHORN, ESQ.
Attorney for Defendant
E. RENE FRANK
Office & P.O. Address
108-18 Queens Boulevard
Forest Hills, New York 11375
Phone: 212 793 5040

TO:

HAVENS, WANDLESS, STITT & TIGHE, ESQS.
Attorney for Plaintiff
99 park Avenue
New York, New York 10016
986 5550

AFFIDAVIT OF E. RENE FRANK IN
SUPPORT OF CROSS-MOTION
 UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

-----X
 ALLENTOWN OFFICE BUILDING CO.,

Plaintiff,

-against-

E. RENE FRANK,

Defendant and
 Third-Party Plaintiff,

-against-

HALYNA SAWYNA,

Third-Party Defendant.
 -----X

COUNTRY OF SPAIN)

SS.:

CITY OF MARBELLA)

E. RENE FRANK, being duly sworn, deposes and says:

1. I am the Defendant and Third-Party Plaintiff in
 the above action.

2. I submit this Affidavit in support of my motion
 to vacate the Default Judgment taken by the Plaintiff against
 me, and in opposition to Plaintiff's application to punish me
 for contempt.

3. This action was commenced by the service, upon me,
 of a Summons and Complaint. An Amended Complaint was served on or

AFFIDAVIT OF E. RENE FRANK
IN SUPPORT OF CROSS-MOTION

about June 26th, 1973.

4. My Amended Answer, containing a Counterclaim, and asserting a third-party claim against the Third-Party Defendant, was served on or about August 24th, 1973.

5. My Answer and Amended Answer was interposed on my behalf by NEWMAN, ARONSON & NEUMANN, ESQS., of New York City.

6. On or about September 19th, 1971, I moved my residence to Marbella, Spain.

7. On or about July 9th, 1974, my attorneys made an application to this Court to withdraw as my attorneys in this matter.

8. By the time I had received notice that an Order had been made directing me to obtain new attorneys, I was in active settlement negotiations with Dr. Ruger, the principal of Plaintiff.

9. Dr. Ruger agreed that the present litigation would be held in status quo, pending the outcome of our negotiations. Dr. Ruger advised me that he would so inform the attorneys for Plaintiff of his agreement.

10. On September 2nd, 1974, I made a proposal of settlement to Dr. Ruger, and he stated that he would consider same and advise me.

AFFIDAVIT OF E. RENE FRANK IN
SUPPORT OF CROSS-MOTION

11. I then received a letter from Dr. Ruger dated October 4th, 1974, a copy of which and the translation of same is annexed hereto and made a part hereof.

12. During the settlement negotiations, I coincidentally met Mr. David Taylor, of the firm of HAVENS, WANDLESS, STITT & TIGHE, ESQS., Plaintiff's attorneys, in Spain.

I discussed with him the status of the settlement negotiations and Dr. Ruger's agreement not to proceed with the litigation pending the outcome of such negotiations.

13. Then, to my surprise, I received notice that a Default Judgment had been entered against me.

14. I respectfully point out to the Court that my delay in authorizing successor counsel to act in my behalf had been occasioned by my reliance upon the settlement negotiations and the understanding that further prosecution of the lawsuit would be halted during this period. It is also my understanding that during the pendency of the action, the Court had urged that the parties engage in settlement discussions.

15. I understand that the Default Judgment taken against me is in the approximate sum of \$180,000. It is not necessary to restate the obvious, that this is a great deal of money. I ask in the interests of justice that I be permitted my day in court. I respectfully submit that my delay in securing new

AFFIDAVIT OF E. RENE FRANK IN
SUPPORT OF CROSS-MOTION

counsel was excusable under the circumstances.

16. I have a meritorious and sufficient defense to this action, which up until the time my original attorneys withdrew, had been advanced diligently and properly. The Plaintiff should not be permitted to enter a Default Judgment against me, when in fact, I had never defaulted, but had interposed an answer and had participated in various pre-trial proceedings. My sole neglect, if it can be characterized as such, was my failure to obtain new counsel immediately and the reason for this delay has heretofore been explained.

17. This lawsuit has always been of vital concern to me. After my lawyer withdrew, I communicated directly with the Court on a number of occasions, the most recent being by letter dated January 7th, 1975, a copy of which is annexed hereto.

18. Plaintiff's complaint alleges four (4) counts against me:

The first count alleges misrepresentation involved in a real estate transaction.

The second count alleges breach of a management agreement and a personal guaranty.

The Third count is for the return of monies allegedly converted, misappropriated and detained by myself.

The fourth count is based upon an alleged guaranty.

AFFIDAVIT OF E. RENE FRANK IN
SUPPORT OF CROSS-MOTION

19. My amended answer cites the contract of sale involved, which contains none of the alleged representations relied upon by Plaintiff; denies in substance the allegations of the complaint and asserts affirmative defenses and requests affirmative relief based upon the actions of Plaintiff.

20. The defense of this action had been hampered by change of residence to Spain and my financial inability to pay certain fees and expenses to the firm of NEWMAN, ARONSON & NEUMANN.

21. It was substantially for these reasons that I entered into the settlement negotiations with Plaintiff.

22. It would be an injustice to allow Plaintiff to proceed upon the Default Judgment obtained against me in direct violation of its agreement not to proceed during the settlement negotiations, and for the other reasons stated herein.

23. I believe that I have a meritorious defense to the action, and am ready, willing and able to proceed, in an expeditious manner with the litigation.

24. Although, I understand that the motion to punish me for contempt is academic, should the Court grant my application to set aside the Default Judgment, I should like to address myself briefly to it.

AFFIDAVIT OF E. RENE FRANK IN
SUPPORT OF CROSS-MOTION

25. ~~The notice to take my deposition was returnable on~~
November 18th, 1974. It was postmarked New York November 1st.
Mail to Marbella generally takes from 6 to 10 days. ~~To the best~~
~~of my recollection,~~ I did not receive it until my return to my
home in Marbella, Spain, subsequent to November 18th, 1974. My
business involves a great deal of travel and I am frequently away
from my home for lengthy periods of time.

26. I do not recall receiving the Order of the Court,
which I understand was dated January 13th, 1975.

27. My attorney, BERNARD HIRSCHHORN, has advised me
that the Order to Show Cause to punish me for contempt was mailed
to Marbella, Spain on January 31st, 1975 and signed for by someone
on February 6th, 1975. I was not in Spain from January 24th until
February 12th, 1975 and had no knowledge of this order until
February 12th, 1975.

28. The legal issues relating to the propriety and
service of these instruments will be treated by my attorney in an
affidavit to be simultaneously submitted herewith.

29. I respectfully request that the Default Judgement
be vacated and that the motion to punish for contempt be denied.

E. Rene Frank

E. RENE FRANK

Sworn to before me this
day of February, 1975.

[Signature]

Yo, LUIS OLI.....

AFFIDAVIT OF E. RENE FRANK IN
SUPPORT OF CROSS-MOTION

VER SACRISTAN, ABOGADO-NOTARIO DEL ILUSTRE COLEGIO DE GRANA-
DA, CON VECINDAD Y RESIDENCIA DEMARCADA EN ESTA CIUDAD DE--
MARBELLA, DISTRITO NOTARIAL DEL MISMO NOMBRE: -----

DOY FE: Que considero legítima la firma y rúbrica-
que antecede de Don Ernest Rene Frank, mayor de --
edad, casado, industrial, de nacionalidad norteamer-
icana, domiciliado accidental en esta ciudad, Ave-
nida de Ricardo Soriano, 12, con pasaporte número-
02717437 expedido en Nueva York el 20 de Diciembre
de 1.973, válido a la fecha; por haber sido puesta
por el interesado a mi presencia a quién acredito-
su personalidad con el pasaporte antes mencionado:

MARBELLA, 28 de Febrero de 1.975.-



24
g. [Signature]

TER FROM DR: RENATUS RUGER
GERMAN

A65

Dr. Renatus Rüger

5 KÖLN 30, 4. Okt. 1974
GRAEFFSTRASSE 5 Dr.R/k.
HERKULES-HOCHHAUSER
TELEFON (02 21) 5 77 91

Mr.
René Frank
International Property Counselor

630 Fifth Avenue

NEW YORK, N.Y. 10020
USA

Lieber René,

herzlichen Dank für Deinen Brief vom 25. 9. 1974.
Zur Klarstellung darf ich wiederholen, wie in unserer Besprechung zum Ausdruck gebracht, daß ich für eine vernünftige Kompromißlösung des in USA schwebenden Prozesses bereit bin, wenn der Vergleich über die von meiner Gruppe beauftragten Anwälte: Havens, Wandless, Stitt & Tighe, New York, geschlossen wird.

Wir haben dann Möglichkeiten erörtert und Du hast mir zugesagt, in Briefform einen Vergleich vorzuschlagen, von dem ich Dir gesagt habe, daß er grundsätzlich interessant sein könnte. Ich verwahre mich daher gegen die Unterstellung im ersten Absatz Deines Schreibens, wonach wir eine Übereinkunft getroffen haben.

Wenn man Deine Idee aufgreift, 50 % der Anteile vom Allentown-Gebäude, d.h. der Gesellschaft zurückzukaufen, zu einem Nettobarpreis von US-Dollar: 125.000,-, so entspricht das einmal in etwa den damaligen Gestehungskosten. Es müßten aber hinzugefügt werden die inzwischen erbrachten Tilgungsleistungen.

Für die inzwischen entstandenen Mietverluste, die Du garantiert hast, sollte ein Ausgleich in der Form gefunden werden, daß ich dafür ein Penthouse im Holyday Park in Marbella erhalte. Da ich das Haus zu einem Vorzugspreis von Dir erhalten sollte, wäre nach überschlägiger Rechnung ein Preis von rund 65.000,- Dollar, nämlich der Hälfte des eingeklagten Betrages erreicht worden.

Dr. Renatus Rüger

Blatt 2 zum Schreiben vom 4. Okt. 1974 an Mr. René Frank, New York

Es wäre also zu liefern von Deiner Seite bar der Kaufpreis plus Tilgung, die man noch einmal errechnen müßte gegenüber der Übergabe der Aktien und die Penthousewohnung lastenfrei.

Wir hätten dann noch die Möglichkeit, durch den gemeinsamen Verkauf des Hauses in Allentown jetzt entstandene Buchverluste wieder hereinzuholen.

Den bereits genannten beauftragten Anwälten habe ich Kopie dieses Schreibens übermittelt.

In Erwartung Deiner Stellungnahme verbleibe ich

mit freundlichen Grüßen
- Dr. Rüger -

Von Herrn Dr. Rüger diktiert,
in seiner Abwesenheit unterschrieben von

J. Hübner
Sekretär

ISH TRANSLATION OF LETTER
DR. RENATUS RUGER

Translation of Letter

Dr. Renatus Ruger to E. Rene Frank
dated October 4 1974

Dear Rene,

Many thanks for your letter of September 25th. I would like to restate to you and clarify that I am ready to settle our legal involvement in the U.S. as I have told you during our last meeting, conditioned on the legal consent on the attorneys who are handling the legal matter of my company in the U.S.; Havens, Wandless, Stitt & Tighe of New York.

At that time, (of our last meeting) we have explored the various possibilities and you have consented and confirmed in writing a solution which I have found basically interesting for my group. I would like to comment that I am not in agreement with the first paragraph of your letter wherein a full settlement had been reached between us.

To restate your offer: you would repurchase 50% of the Allentown property - i.e. 50% of the shares of the Allentown building at a net value of \$125,000 which is more or less my cost price at the time of acquisition. However, this does not include the interim amortization.

For the loss of rent which you have guaranteed we should find a solution whereby I would purchase a penthouse in the Holiday Park of Marbella. As I would receive this penthouse at a reduced price of around \$65,000 this would correspond approximately to one half of the settlement.

You would have to deliver the purchase price plus amortization, which we would have to agree upon at the time of the delivery of the shares of the Allentown building and you would have furthermore deliver the penthouse free and clear.

This would then give us the possibility to recouperate the book losses of the Allentown building at a future resale of this property.

I have sent to the attorneys a copy of this letter. Please let me know what your thoughts are and I remain with friendly regards.

OF E. RENE FRANK TO
WARD

A68

E. RENE FRANK
Avda Ricardo Soriano, 12,
MA ELLA (Málaga),
Spain.

7th January, 1975

The Honourable Robert J. Ward,
United States District Court,
Foley Square,
New York City.

Ref: Allentown Office Building Co.
versus E. René Frank.
Index 73 CIV 1923-73.

Honourable Sir,

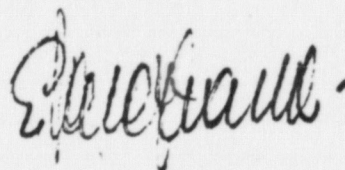
I have recently learned that a judgement has been entered against me, in absentia, in connection with the above matter.

I am at a total loss to understand how this could have occurred in view of the fact that I have had several meetings here, in Spain, with the de facto plaintiff, Dr. Rüger of Cologne, Germany, and that, on October 4th, 1974, Dr. Rüger confirmed his proposal to me in writing.

It is also shocking to me that the attorney acting for the plaintiff, Mr. David Taylor, met with me in Marbella, Spain, on or about October 8th and not once mentioned to me that a hearing had been scheduled for October 13th, although he was well aware that I was no longer represented by legal counsel.

I have arranged to hire another attorney and hope that he will be able to take whatever appropriate action necessary to protect my interests.

Respectfully yours,



E. René Frank

AFFIDAVIT OF
BERNARD HIRSCHHORN

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

-----X

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff,

-against-

A F F I D A V I T

E. RENE FRANK,

Defendant and
 Third-Party Plaintiff,

-against-

HALYNA SAWYNA,

Third-Party Defendant.

-----X

STATE OF NEW YORK)

SS.:

COUNTY OF QUEENS)

BERNARD HIRSCHHORN, being duly sworn, deposes and
 says:

1. That I am the attorney for the Defendant and
 Third-Party Plaintiff, E. RENE FRANK, hereinafter referred to as
 Defendant, and submit this affidavit in support of his motion to
 vacate the judgment in the sum of \$180,000.00 entered against
 him by default.

2. This action was commenced by service of a summons
 and complaint and issue was joined by service of an answer. Each
 side amended its pleadings. The complaint contains four (4)
 causes of action charging Defendant with fraudulently inducing
 Plaintiff to enter into a contract to purchase a building, despite

AFFIDAVIT OF
BERNARD HIRSCHHORN

the fact that none of the alleged representations appear in the contract, for breach of a management contract, for withholding rents collected and for breaching a contract of guarantee of a minimum income to be earned from the property. The answer of Defendant denied the allegations of the complaint and set up defenses, including the Parole Evidence Rule being a bar to the representations alleged to have been made by Defendant, etc. and interposed a counterclaim for malicious interference with a contract of Defendant. The issues are hotly contested, both on the law and on the facts. Defendant has a good and meritorious defense to the action.

3. Prior counsel for Defendant moved this Court to withdraw for alleged non-cooperation by his client and his failure to pay fees to the extent billed. The motion was granted. Counsel was permitted to withdraw. When Defendant failed to obtain new counsel or file a pro se appearance, judgment by default in the sum of \$180,000.00 was entered against him and supplementary proceedings commenced.

4. It is submitted that the answer filed by withdrawing counsel was tantamount to an appearance by Defendant pro se, and that the drastic remedy of default judgment should not have been granted. No Federal Rule authorizes such disposition under

the circumstances. It is hardly to be expected that a layman would be capable of comprehending how to draft a Notice of Appearance, and so, should not be penalized for his unfamiliarity with legal technicalities. Moreover, the default of Defendant was not wilful, since he was led to believe all proceedings would be held in abeyance pending his negotiations to settle the case with Plaintiff.

5. Judgments by Default are frowned upon by the courts. A trial on the merits is to be encouraged. Rules 55 and 60 of the Federal Rules of Civil Procedure provide authority for this Court to vacate a Judgment by Default. Discretion should be exercised especially in this case, where the time gap between default and application to open it is small, so that it can hardly be urged that Plaintiff has been prejudiced. Moreover, there does not seem to be any authority to enter a Default Judgment where an Answer has been filed by withdrawing counsel, even when a Defendant has not retained new counsel. Such default would only be proper were the case reached for trial and the Defendant declined to defend in person or through counsel, a circumstance that had not occurred in this case. Justice and fair play would seem to command that the Court's discretion be exercised to afford this Defendant his day in Court.

BE HCC
BERNARD HIRSCHHORN

Sworn to before me this
28th day of February, 1975.

George M. Winter

NOTARY PUBLIC, State of New York
No. 31966-3
Qualified in Nassau County
Commission Expires March 30, 1976

SUPPLEMENTAL AFFIDAVIT OF GARY P. ROSENTHAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ALLENTOWN OFFICE BUILDING CO., :

Plaintiff-Judgment Creditor, : Index No. 73 CIV 1923 (RJW)

-against- : SUPPLEMENTAL
AFFIDAVIT

E. RENE FRANK, :

Defendant-Judgment Debtor. :

-----x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GARY P. ROSENTHAL, being duly sworn, deposes and
says:

I am an attorney duly admitted to practice before
this Court and am associated with the firm of Havens, Wandless,
Stitt & Tighe, attorneys for the above-entitled plaintiff-judgment
creditor. I submit this affidavit in opposition to the motion
of E. RENE FRANK (hereinafter sometimes referred to as "Frank"),
the defendant and judgment debtor hereinabove named, in which he
seeks an order vacating the default judgment entered against him
in the above-entitled matter; and in support of plaintiff's
application to adjudge defendant in contempt for failing to obey
an order of this Court and appear at a deposition in aid of en-
forcement of said judgment.

The Default

On October 18, 1974 this Court on motion of plaintiff,

entered judgment against Mr. Frank upon his failure to defend this action. In brief, the judgment in pertinent part awarded to plaintiff the approximate sum of \$180,000 which, including interest, represented amounts due and owing by Frank to plaintiff under the terms of his guaranty agreement as alleged in the fourth cause of action of the amended complaint for years 1972, 1973 and 1974; and struck and dismissed defendant's answer, counterclaim and third party complaint.* A copy of said judgment is annexed hereto, made a part hereof and is designated Exhibit "A".

In support of his motion defendant argues, (a) that his default was excusable by reason of certain purported settlement "negotiations" that had allegedly taken place in Spain between himself and one Renautus Rueger and (b) that in all event, the Court should not have directed entry of a default judgment against defendant because his prior pleadings constituted a pro se appearance. The arguments are unsupported by the record and inapplicable as a matter of law, all as is more particularly set forth in plaintiff's memorandum of law. Indeed, more must be said. Defendant's arguments at this point in time are simply incredulous and are an affront to the Court, counsel and the orderly and fair disposition of this matter. Defendant's game plan is clear: if on the eve of each and every step in the prosecution of this case he can buy time by delay, plaintiff

* For a full statement of the facts and the merits of plaintiff's claims, the Court is respectfully referred to the affidavits of David G. Taylor and Steven Kriegsman submitted in support of plaintiff's motion for entry of a default judgment.

will ultimately tire as a result of the passage of time, continued frustration, and yes, the continued and extended expense of prosecution by way of legal fees. I respectfully submit that the instant motion is simply Mr. Frank's latest attempt at delay, by which method he hopes to bludgeon a settlement on his terms and conditions.*

Significantly, Frank does not directly dispute the fact that he received timely notice of the default. Indeed, various notices with respect to such judgment were served upon Frank, not once, but several times. By notice of motion returnable September 24, 1974, plaintiff moved for entry of a default judgment against Mr. Frank. Said motion, made pursuant to FRCP Rule 55(b) (2), was on notice to Frank. A copy of the notice of motion together with proof of service thereof are annexed hereto, made a part hereof and designated Exhibit "B". That Mr. Frank received such notice of motion together with the papers in support thereof is beyond dispute. Mr. Frank himself refers to such motion papers in a Telex dated October 7, 1974, a copy of which is annexed hereto, made a part hereof and designated Exhibit "C". Frank failed to defend or otherwise appear in opposition to said motion. By Memorandum Order dated October 8, 1974 this Court granted plaintiff's motion and directed that an order and judgment be settled

* After service of the Summons and Complaint, Frank's counsel requested repeated extensions of their time to answer asserting that Frank was out of the country and could not be reached. After plaintiff noticed the taking of Frank's deposition, defendant's counsel moved for an adjournment, again asserting his absence from the country. When Frank did appear he did so only briefly, pleading illness, and did not return for some time thereafter. Further defendant made a motion to implead an additional third party de-

on notice. Pursuant thereto plaintiff served a notice of settlement returnable October 17, 1974 together with a copy of its proposed order and judgment upon Mr. Frank, Air Mail. A copy of such papers together with proof of service thereof are annexed hereto made a part hereof and are collectively designated Exhibit "D". Again, Frank characteristically failed to appear upon the settlement date.

Thereafter on October 18, 1974, judgment was filed and entered against Mr. Frank. On October 30, 1974 a copy of said judgment together with notice of entry thereof was served upon Mr. Frank. Copies of such papers, together with proof of service thereof, are annexed hereto made a part hereof and are collectively designated Exhibit "E". Moreover, on October 30, 1974 plaintiff also served upon Frank its proposed bill of costs returnable November 6, 1974, a copy of which with proof of service upon Mr. Frank is annexed hereto made a part hereof and designated Exhibit "F". Again, Mr. Frank failed to appear.

Moreover, in addition to the numerous notices served upon him by plaintiff, notice of the default judgment apparently was also served upon him by the Clerk of this Court as required by FRCP Rule 77 (d). A copy of the relevant docket entry reflecting such mailing is annexed hereto made a part hereof and designated

-continued- fendant and sought to take the deposition of Dr. Rueger, but let said motion lapse and failed to take Dr. Rueger's deposition although the dates therefor had been agreed upon. Then, virtually on the eve of trial, this matter was further delayed by Frank's counsel's motion to withdraw. Even after that Frank, by his silence and apparently through communications with the Court, attempted to further delay matters. The same shopworn excuses advanced by Frank in the past - absence from the country, etc., are again being advanced by him in support of his motion to vacate.

Exhibit "G". Thus, Mr. Frank had ample notice and opportunity to appear in connection with the default proceedings if he so desired.

The excuses Mr. Frank now offers are groundless. As to the first of Mr. Frank's excuses - the purported settlement discussions - the accompanying affidavit of Dr. Rueger clearly shows that the alleged settlement "negotiations" were virtually non-existent and that none of the representations alleged by Mr. Frank to have been made to him were, in fact, actually made. There is absolutely no possibility that Mr. Frank could have been misled as to the plaintiff's intentions with respect to prosecution of this law suit. The conduct of the suit was not even discussed. Nevertheless, defendant would have this Court believe that he was lead to ignore all of the numerous notices served upon him - a position which would be absurd even for the most unsophisticated litigant to adopt. While Mr. Frank's counsel attempts to paint a picture of him as being an innocent lamb being lead to slaughter, Mr. Frank is far from unsophisticated. He is reputed to have, and holds himself out as having, several decades of experience in the commercial and international real estate field. Moreover, and contrary to his counsel's statements in his affidavit and Memorandum of Law, Mr. Frank holds a law degree from a French university (though apparently is not in active legal practice) and presumably is not unfamiliar with legal proceedings, legal documents, judgments, notices of appearance and the like. Indeed, Mr. Frank seems to pride himself on his legal ability. Relevant portions of Mr. Frank's deposition testimony in this regard are annexed hereto

made a part hereof and designated collectively Exhibit "H".

It is respectfully submitted that Mr. Frank's entire position in support of his motion has absolutely no basis in fact and strains credulity. Illustrative is Mr. Frank's statement on page 3 of his moving affidavit that his ". . . delay in authorizing successor counsel to act in my behalf had been occasioned by my reliance upon settlement negotiations and the understanding that further prosecution of the law suit would be halted during this period." Yet, this Court at the hearing on February 14, 1975 advised that during the period adverted to by Mr. Frank he communicated with the Court and sought additional time to obtain substitute counsel because illness prevented him from promptly acting in that regard. No mention of settlement discussions was apparently made to the Court at the time of that request, as no mention of any alleged illness is made now.

Similarly, on page 5 of his affidavit, Mr. Frank states that the defense of this action was in part hampered by his financial inability to pay counsel, yet, in the same breath he states that it was in part for that reason that he allegedly entered into settlement discussions with Dr. Rueger. In view of his purported financial straits one must seriously question Mr. Frank's good faith in proposing even to enter into discussions. Indeed, in view of his alleged financial circumstances, it would appear that any purported attempt by Mr. Frank to settle this matter was merely a ruse in an effort to buy time.

As to Mr. Frank's other contention, that this Court

should not have entered a default judgment upon his failure to obtain substitute counsel or appear pro se, I note that under Rule 55 FRCP a default judgment may be entered against a defendant for failure to defend an action even after having appeared therein, and that the failure to obey such a Court order as was issued herein is such a wilful failure to defend as will permit entry of a default judgment (more on this point is set forth in the accompanying Memorandum of Law). While Frank's counsel attempts to construct an argument that Frank's prior pleadings constituted a pro se appearance by him, it is obvious that Frank had no intention of representing himself. It is deponent's understanding that throughout his various communications with the Court, he never indicated that he wanted to defend himself or sought advice as to how to go about it. He merely sought time to obtain substitute counsel. As a law graduate, he could not, in any event, be wholly ignorant as to how to proceed. Moreover, even assuming, arguendo that his prior pleadings constituted a pro se appearance, his subsequent failure to oppose plaintiff's motion for a default judgment, was itself a default within the meaning of FRCP Rule 55.

If one thing emerges clearly out of the foregoing, it is the fact that Mr. Frank could have acted in a timely fashion but, consciously and deliberately chose not to do so. His asserted excuses for failing to do so, it is submitted, do not have the ring of truth and are nothing more than a further attempt at delay. It is submitted that in view of all the foregoing Mr.

Frank should not be entitled to any equitable considerations and the judgment as it stands should not be disturbed.

Additionally, it should be noted that even if Mr. Frank had a valid excuse for his failure to defend, that alone would not be sufficient to warrant opening of a default. He must also show by way of affidavit the meritorious nature of his defense. In this connection Frank's affidavit in a most terse and conclusory fashion merely summarizes his pleadings and, consequently, is wholly deficient as an affidavit of merit, again as is more particularly set forth and argued in the accompanying Memorandum of Law.

Contempt

Frank opposes plaintiff's motion to adjudge him in contempt on two grounds, namely, (a) the alleged failure to give him proper notice of the proceedings in aid of enforcement of the judgment and (b) his failure to obey such notice and orders are excused because he allegedly did not have personal knowledge of them. Here again, defendant's contentions are without merit. The pertinent facts are as follows:

After entry of the aforesaid judgment against him plaintiff noticed the taking of Mr. Frank's deposition upon oral examination in aid of enforcement of said judgment pursuant to FRCP Rules 69 (a), 2^c and 30. Said notice which was served upon Mr. Frank on October 30, 1974 directed him to appear for said examination at the offices of plaintiff's counsel on November 18, 1974. A copy of said notice together with proof of service

thereof is annexed as Exhibit "B" to plaintiff's moving papers in support of the contempt order. Mr. Frank failed to appear at the date and time specified in said notice.

Plaintiff then moved this Court for an order directing Mr. Frank to appear at the Courthouse for taking of such deposition on January 28, 1975. A copy of said order was duly served upon Mr. Frank, Air-Mail Special Delivery. A copy of that order with proof of service thereof is annexed as Exhibit "A" to plaintiff's moving papers in support of its motion for contempt. Again, Mr. Frank failed to appear. Upon such default plaintiff moved by way of order to show cause for an order adjudging Mr. Frank in contempt, which motion is currently pending before this Court.

While defendant takes issue with the manner of service of these papers upon Mr. Frank, as more fully shown in plaintiff's Memorandum of Law, the manner in which such proceedings were instituted and papers served is entirely in accordance with the Federal rules.

Moreover, plaintiff sought the order of this Court directing Frank to appear and the subsequent contempt order, only after giving Frank every opportunity to appear voluntarily. On or about December 2, 1974 deponent's firm received a letter from an attorney named Robert Jay Dinerstein who stated that he now represented Mr. Frank with respect to this law suit. A copy of said letter is annexed hereto made a part hereof and designated Exhibit "I". In response thereto your deponent, by letter dated December 18, 1974, advised Mr. Dinerstein of defendant's default

in appearing for his noticed deposition and further advised him of our intentions to obtain an order compelling him to appear if he did not do so voluntarily. A copy of said letter is annexed hereto made a part hereof and designated Exhibit "J". Subsequently, your deponent had a telephone conversation with Mr. Dinerstein at which time said attorney requested that plaintiff delay for a few days the submission of its application for said order compelling Frank to appear and stated that in the interim he would attempt to contact Mr. Frank, ascertain his willingness to appear voluntarily and would get back to your deponent in a day or so. After waiting for approximately a week and a half and not having heard from Mr. Dinerstein by that time (or ever again, for that matter) plaintiff sought the aforementioned order.

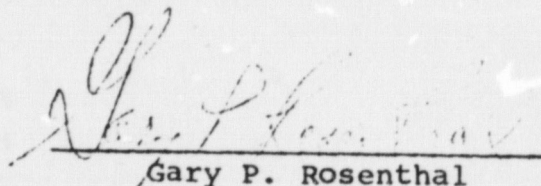
Although Mr. Dinerstein had not formerly appeared in this matter, plaintiff, in addition to serving Mr. Frank also served a copy of said order upon Mr. Dinerstein as well. The same procedure was followed with respect to the order to show cause and supporting papers in connection with plaintiff's application to adjudge Mr. Frank in contempt.*

If Mr. Frank's point is, as Mr. Frank's counsel may now be claiming, that it would have been burdensome for defendant

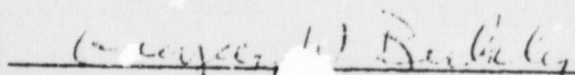
* It should be noted that under local Civil Rule 14 service of contempt papers may be made upon the contemnor's attorney. In this case the papers were served upon both Mr. Frank in accordance with the provisions of the order to show cause as well as upon his then attorney and such service is conceded by defendant.

to appear for his deposition in New York (although he comes to New York regularly), the appropriate remedy would have been to seek relief by way of an application for a protective order. And in this regard, one final word may be appropriate. Mr. Frank's counsel has indicated that Mr. Frank would be available to testify during the period April 15 - May 1, 1975. It is respectfully suggested that those dates would be a convenient time for Mr. Frank to appear for a deposition in aid of enforcement of the judgment against him. In that event, plaintiff has no objection to staying the application for contempt pending said deposition.

WHEREFORE, it is respectfully requested that defendant's motion to vacate be, in all respects, denied and that plaintiff's motion to adjudge defendant in contempt be, in all respects, granted. Alternatively, it is respectfully requested that this Court direct that Mr. Frank appear for his deposition at specified dates in the period April 15 - May 1, 1975, and that it stay plaintiff's application for contempt pending the taking of said deposition.


 Gary P. Rosenthal

Sworn to before me this 18th
 11th day of March, 1975.


 Notary Public
 State of New York
 Commission Expires 12/31/75

ORDER AND JUDGMENT (Filed October 18, 1974)

A83

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USA (P)
Filed

Oct 18, 1974
10:00 AM

73 CIV. 1923/73
(RJW)

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff

against

E. RENE FRANK,

ORDER AND JUDGMENT

Defendant and
Third-Party
Plaintiff

#70, 823

against

HALYNA SAWYNA,

Third-Party
defendant

Plaintiff and third-party defendant having moved this Court for an Order striking the Answer, dismissing the counter-claims and dismissing the third-party claim interposed by defendant and third-party plaintiff and for a judgment in favor of plaintiff and against said defendant and third-party plaintiff, upon the ground that the said defendant and third-party plaintiff has defaulted in entering an appearance as required by an Order of this Court dated July 23, 1974, and this Motion having regularly come on to be heard;

Now, upon reading and filing the Summons and Amended Complaint with proof of personal service thereof, the Amended Answer with counterclaims, the reply to counterclaims, the third-party Summons and Complaint, the Answer to the third-party

Complaint, and upon reading and filing the Notice of the aforesaid Motion dated September 16, 1974, the affidavit of David G. Taylor, sworn to the 16th day of September 1974, the exhibits annexed thereto, the affidavit of Steven A. Kriegsman, sworn to the 16th day of September 1974, with proof of due and timely service of all the foregoing upon defendant and third-party plaintiff, all submitted in support of said Motion, and defendant and third-party plaintiff having failed to submit answering papers or otherwise oppose said Motion, and said Motion having been duly submitted before the Hon. Robert J. Ward, United States District Judge for the Southern District of New York, and due deliberations having been had, and the decision of the Court having been read and filed, and it being expressly determined that there is no just reason for delay and expressly directed that final judgment be entered as hereinafter set forth.

Now, on motion of Havens, Wandless, Stitt & Tighe, attorneys for plaintiff and third-party defendant, it is:

ORDERED, ADJUDGED AND DECREED

1. That the aforesaid Motion be and the same hereby is in all respects granted;
2. That the Answer, affirmative defenses, counter-claims and the Third-Party Complaint interposed by E. Rene Frank, the defendant and third-party plaintiff, are hereby dismissed on the merits and with prejudice;
3. That Allentown Office Building Co., the plaintiff, a Pennsylvania corporation with its principal office at the Center Square Building, Allentown, Pennsylvania, do recover of E. Rene Frank, the defendant and third-party plaintiff, with a last known address at Avenue Ricardo

A85

Soriano 12, Marbella (Malaga), Spain, the sum of \$160,692 with interest thereon as follows:

on \$11,940 at 7-1/2% from May 1, 1971 to August 31, 1972 in the sum of \$1,194.00

on \$11,940 at 6% from September 1, 1972 in the sum of \$1,533.55

on \$71,465 at 7-1/2% from May 1, 1972 to August 31, 1972 in the sum of \$1,786.62

on \$71,465 at 6% from September 1, 1972 in the sum of \$9,179.15

on \$38,824 from May 1, 1973 in the sum of \$3,435.01

on \$38,463 from May 1, 1974 in the sum of \$1,093.82

for total interest of \$18,224.15 and costs and disbursements ^{to be} ~~as~~ taxed by the Clerk, amounting in all to the sum of \$- and that plaintiff have

execution therefor;

4. That the foregoing is without prejudice to plaintiff's right to seek, at the appropriate time a determination of amounts due it from defendant and third-party plaintiff under the Guaranty Agreement dated May 1, 1971, for years 1975 and 1976 as set forth in the fourth Cause of Action of the Amended Complaint,

which said claims are hereby severed and the balance of the action is transferred to the Supreme Calendar of this Court.

Dated: New York, New York
October 17th, 1974

Robert F. Ward
United States District Judge

JUDGMENT ENTERED:

Raymond J. Burgin
Clerk

October 18, 1974

11-6-74- No appearance in opposition. City Court is filed in the amount of \$186,475, in favor of plaintiff.

NOTICE OF MOTION

A86

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff

73 CIV. 1923/73
(RJW)

against

E. RENE FRANK,

NOTICE OF MOTION

Defendant and
Third-Party
Plaintiff

against

HALYNA SAWYNA,

Third-Party
Defendant

S I R S :

PLEASE TAKE NOTICE that upon the Order of the Honorable Robert J. Ward, dated July 23, 1974, the affidavit of David G. Taylor, sworn to the 16th day of September, 1974, the exhibits annexed thereto, the affidavit of Steven A. Kriegsman, sworn to the 16th day of September, 1974, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court before the Hon. Robert J. Ward in Room 7, United States District Courthouse, Foley Square, New York, New York, on September 24th, 1974, at 2:15 in the afternoon of that day or as soon thereafter as counsel can be heard for the following relief:

- (a) An Order striking the answer, dismissing the counterclaims and dismissing the third-party complaint interposed by defendant and third-party plaintiff, E. Rene Frank;

- (b) A judgment by default in favor of plaintiff and against said defendant and third-party plaintiff, pursuant to Rule 55 of the Federal Rules of Civil Procedure, upon the ground that the said defendant and third-party plaintiff, E. Rene Frank, has failed to comply with the terms of the aforesaid Order of this Court dated July 23, 1974, and
- (c) Such other and further relief as to the Court may seem just and proper, including the costs and disbursements of this motion.

Dated: New York, N. Y.
September 16, 1974

Yours, etc.,

HAVENS, WANDLESS, STITT & TIGHE

By: David Taylor
A Member of the Firm
Attorneys for Plaintiff and
Third-Party Defendant
Office and P. O. Address
99 Park Avenue
New York, N. Y. 10016
212-986-5550

To: E. RENE FRANK
Defendant and Third-Party
Plaintiff
Avenue Ricardo Soriano 12
Marbella (Malaga)
Spain

SUPPORTING AFFIDAVIT OF DAVID G. TAYLOR
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff

73 CIV. 1923/73
(RJW)

against

E. RENE FRANK,

Defendant and
Third-Party
Plaintiff,

AFFIDAVIT

against

HALYNA SAWYNA,

Third-Party
Defendant

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

DAVID G. TAYLOR, being duly sworn, deposes and says:

I am an attorney, duly admitted to practice before this Court and am a member of the firm of Havens, Wandless, Stitt & Tighe, attorneys for the plaintiff, Allentown Office Building Co. ("AOBC") and third-party defendant, Halyna Sawyna ("SAWYNA"). Also, I am the Secretary of AOBC and am fully familiar with the facts and circumstances of this case. This affidavit is submitted in support of the instant application of AOBC for the relief set forth in the annexed Notice of Motion, to wit: an order striking the answer, dismissing the counterclaims and third-party complaint

of defendant and third-party plaintiff, E. Rene Frank ("FRANK"), A89 and directing the entry of a judgment by default pursuant to Rule 55 FRCP in favor of AOBC and against FRANK. This motion is predicated upon FRANK's failure to comply with the Order of this Court dated July 23, 1974, pursuant to which FRANK's attorneys were permitted to withdraw as his counsel of record. Said Order directed FRANK to retain new counsel or to appear pro se and provided that in the event FRANK failed to obtain the appearance of substitute counsel or enter an appearance pro se within 20 days of the date of the Court's said Order, AOBC may proceed with the prosecution of the action. A copy of said Order is annexed hereto, made a part hereof and designated Exhibit "A". The specified 20-day period has expired without FRANK having appeared.

At the time of FRANK's default, except for some open discovery matters, sought by FRANK, this case was ready for trial. The pleadings submitted by the parties consist of an Amended Complaint, Answer containing counterclaims against AOBC; Reply to Counterclaims; Third-Party Complaint and SAWYNA's Answer thereto. For the convenience of the Court, copies of such pleadings are annexed hereto, made a part hereof and designated Exhibits "B" through "F".

I have read the Amended Complaint and have full knowledge of the matters therein alleged having been, as noted supra, Secretary of AOBC from April 26, 1971, the time of its incorporation, to the present. AOBC is a Pennsylvania corporation with its principal office in Allentown, Pennsylvania, and whose sole activity is the ownership and operation of the said Center Square Building. This is an action by AOBC to recover damages for fraud.

conversion and the breach by FRANK of various agreements with AOBC arising out of and in connection with the purchase by AOBC of the "Center Square Building", an office building located in Allentown, Pennsylvania. Briefly, the First Count of the Amended Complaint alleges fraud in that FRANK, by means of material misrepresentations of fact, induced AOBC to purchase the "Center Square Building", as a result of which AOBC was damaged in the sum of \$350,000 with interest. The Second Count alleges that FRANK breached his management agreement with AOBC and seeks recovery of damages in the amount of \$350,000 with interest. The Third Count seeks damages for FRANK's conversion of sums collected by FRANK on behalf of AOBC in the sum of \$11,940 with interest. The Fourth Count seeks recovery of sums due and owing to AOBC under the terms of FRANK's Guaranty Agreement totalling \$351,465 with interest. AOBC also seeks recovery of punitive damages in the amount of \$500,000.

The factual details giving rise to the causes of action set forth in the Amended Complaint are as follows:

Prior to May, 1971, FRANK was a general partner in a partnership which owned the Center Square Building. On or about June 26, 1970, FRANK, on behalf of said partnership, entered into an agreement for the purchase of the building with Interboden, A. G., a Swiss corporation, which, prior to the closing, assigned its interest under said agreement to AOBC. At the closing, which took place in May, 1971, AOBC took title to the Center Square Building from said partnership and in connection therewith entered into two Agreements with FRANK, both dated May 1, 1971, namely, the "Management Agreement" and "Guaranty". Copies of such agreements are

annexed as exhibits to the Amended Complaint, Exhibit "B" hereto. Said agreements required FRANK respectively to undertake the management of the Center Square Building, to perform certain enumerated tasks in connection therewith and to guaranty the net income therefrom to AOBC for a five-year period beginning May 1, 1971. The two agreements comprise the basis for the Second and Fourth Counts and will be hereinafter discussed in greater detail.

FIRST COUNT

To induce AOBC to purchase the Center Square Building, FRANK made several material misrepresentations beginning at various times in and around June of 1970 and continuing to and including May of 1971. On such occasions, FRANK represented that he was personally an international consultant in real estate matters and was expert in the business of operating and managing commercial and other real estate properties for others; that all of the space in the Center Square Building was either rented or leases were about to be executed for the remaining available space; that the Center Square Building provided substantial net profits with a prospective cash flow sufficient to cover all of its indebtedness including that which was to be created pursuant to the purchase agreement dated June 26, 1970; that the Center Square Building was well maintained in a good state of repair and not in need of any renovation and that if any such repainting or decoration was required FRANK would pay the cost thereof; and that FRANK would personally supervise management of the Center Square Building for a period of five years beginning May 1, 1971, and expiring April 3, 1976, in accordance with the terms of his aforesaid Management Agreement.

Such representations were false and were known by FRANK to be false in that he had little or no experience as an international consultant in real estate matters; that at the time of purchase of the Center Square Building the space therein was not all rented but, in fact, the number of leases either had not been consummated or were consummated on terms and conditions far different from those represented by FRANK. Further, the Center Square Building was not operating on a profitable basis as represented, did not generated a positive cash flow and indeed AOBC was required on various occasions to expend sums of money to make up operating deficits; that the building, contrary to FRANK's representations, required substantial renovation, in which connection AOBC was required to spend substantial amounts and FRANK never personally supervised or managed the Center Square Building, obliging AOBC to employ another managing agent and engage its counsel to perform services in connection therewith.

Needless to say, if AOBC was aware of the falsity of such representations, it would not have purchased the Center Square Building. As a result of such fraud, the Amended Complaint alleges that AOBC suffered damage in the sum of \$350,000. That sum is the amount for which FRANK is liable to AOBC under the terms of the Guaranty, namely, \$70,000 per year or a total of \$350,000 over the 5-year life of the guaranty.

SECOND COUNT

This Count is based upon FRANK's breach of his Management Agreement with AOBC. Under the terms of said Management Agreement, FRANK was obligated and required to collect as agent for AOBC all rentals due from tenants; to deposit and place the sums collected in a special custodial account to be maintained by him as agent for AOBC; to make due and periodic accountings of all such funds collected; to disburse on a regular, prompt and punctual basis mortgage payments and all other operating expenses; to pay out to AOBC from such custodial account the amounts of funds remaining after deduction of such operating expenses and mortgage payments and to directly supervise the management of the Center Square Building.

FRANK completely failed to perform in accordance with the terms of the Management Agreement; failed to make payments to AOBC including amounts collected for rent; failed to make mortgage, insurance and utility payments and generally failed to manage the building. As a result of FRANK's breaches of the Management Agreement and the Guaranty, FRANK's employment under said agreement was terminated by letter dated July 20, 1971, which, in part, details the foregoing matters and a copy of which is annexed hereto, made a part hereof and designated Exhibit "G". As alleged in the Amended Complaint, AOBC suffered damage as a result of the foregoing in the sum of \$350,000. The basis upon which such amount is computed is the same as that set forth with respect to the First Count.

THIRD COUNT

At the time of FRANK's termination, he had retained the sum of \$11,940 which he had collected and received for AOBC's account and which represented rent paid by the tenants of the Center Square Building and other income therefrom for the months of May and June of 1971. A copy of the statement of AOBC's accountant showing that such amounts were collected, but were not turned over, is annexed hereto, made a part hereof and designated Exhibit "H".

AOBC as landlord was indisputably the owner of such sum and entitled to immediate possession thereof, which was wrongfully misappropriated by FRANK. Indeed, AOBC and its representatives have made due and proper demand upon FRANK to turn over said amount with interest thereon, but he has failed and refused to do so.

FOURTH COUNT

This count seeks recovery of amounts due and owing by FRANK to AOBC under the terms of his said Guaranty. Under the terms thereof, FRANK guaranteed that AOBC would receive from the rental operations of the Center Square Building a net annual income (after deduction of all operating expenses and mortgage payments due to the Allentown Bank) equal to not less than \$70,000 per annum for each of the five years beginning May 1, 1971, through April 30, 1976. It was further provided under such Guaranty that in the event the net annual income in any agreement year was less than \$70,000 FRANK would make payment, on the 15th day of May following each such agreement year, of a sum equal to \$70,000 less the net annual income actually received by AOBC during the preceding agreement year.

At the end of the first agreement year, April 30, 1972, the Center Square Building had realized no net annual income whatever and, in fact, had suffered a net loss of \$1,465 requiring FRANK for that agreement year to pay AOBC the total of \$71,465 on or before the date prescribed in said agreement as aforesaid. The Amended Complaint then alleges that upon information and belief the Center Square Building would earn no income for the remaining four agreement years so that FRANK was obligated to pay \$70,000 for each of those remaining years or an additional \$280,000. While AOBC has fully performed everything on its part to be performed under the terms of both the Guaranty and the Management Agreement, FRANK has made payment of no sums due and owing to AOBC thereunder, although payment thereof has been duly demanded. Consequently, the total damages sought by AOBC under this count is \$351,465.

At the time the Amended Complaint was served, computations were available only with respect to amounts due and owing by FRANK for the first agreement year of his said Guaranty. We now have available final computations for the agreement year ending April 30, 1973, copies of which were prepared by Steven Kriegsman, AOBC's accountant. I have reviewed the books and records of AOBC, as well as the aforesaid statements of AOBC's accountant, and believe them to fully and fairly reflect the amounts due and owing from FRANK. Such accountant's statements show that for the agreement year ending April 30, 1972 FRANK, as aforesaid, was obligated to AOBC under the terms of his Guaranty for the sum of \$71,465.00. The statement for the agreement year ending April 30, 1973 discloses that FRANK owes AOBC for that year, the sum of \$38,824. While the

statement for the agreement year ending April 30, 1974 has not as yet been finalized, the books and records of AOBC reflect an estimated amount due for that agreement year in the sum of \$38,463.00. Thus the total amount due for agreement years 1972, 1973 and 1974 is \$148,752. Copies of the accountant's statements for agreement years 1972 and 1973 are annexed hereto, made a part hereof and designated as Exhibits "I" and "J" respectively. The foregoing matters are also detailed in the annexed affidavit of Steven A. Kriegsman, C. P. A.

It is respectfully submitted and deponent truly believes that the claims set forth in the Amended Complaint are good and meritorious and that AOBC should have judgment thereon. It is further submitted that FRANK has no valid defense to such claims and that the matters asserted by way of an affirmative defense and counterclaims are sham.

While your deponent believes that AOBC has fully demonstrated its entitlement to recovery, we would, at this juncture, request that the Court make and enter a judgment awarding to AOBC the amounts now due and owing from FRANK pursuant to the Guaranty for agreement years 1972, 1973 and 1974 which, as set forth supra, total \$148,753, plus the sum of \$11,940 converted by FRANK, for a total amount of \$160,692 with interest. It is respectfully submitted that, on these papers, such sums have clearly been shown to be due and owing to AOBC. AOBC reserves its rights as to the balance and would defer any action it might wish to take to determine its damages with respect to subsequent agreement years until the close thereof.

WHEREFORE, it is respectfully requested that the relief requested in the annexed Notice of Motion be in all respects granted and that the AOBC be awarded the costs and disbursements of this motion.

David G. Taylor
David G. Taylor

Sworn to before me this
16th day of September, 1974

Gary P. Rosenthal

GARY P. ROSENTHAL
Notary Public, State of New York
No. 03-3359405
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1975

SUPPORTING AFFIDAVIT OF STEVEN A. KRIEGSMAN A98
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff

73 CIV. 1923/73
(RJW)

against

E. RENE FRANK,

Defendant and
Third-Party
Plaintiff

AFFIDAVIT

against

HALYNA SAWYNA,

Third-Party
Defendant

STATE OF NEW YORK)

COUNTY OF NEW YORK)

: ss.:

STEVEN A. KRIEGSMAN, being duly sworn, deposes and says:

I am a certified public accountant licensed to practice in the State of New York and submit this affidavit in support of the application of ALLENTOWN OFFICE BUILDING CO. ("AOBC") for a default judgment and other relief as more fully set forth in the annexed Notice of Motion and Affidavit of David G. Taylor.

I have served as the accountant for AOBC since its formation. I am fully familiar with the operations of AOBC and with the terms of the Guaranty dated May 1, 1971, given by E. RENE FRANK to AOBC in connection with the purchase of the Center Square Building.

I have read the affidavit of David G. Taylor and have examined Exhibits "H", "I" and "J" annexed thereto. I, or those under my direction and control, prepared such documents based upon

a review of the books and records of AOBC and such documents fully **A99** and accurately reflect the amounts due and owing to AOBC by E. RENE FRANK, as shown by said books and records.

Exhibit "H" is a statement showing the amount of net income over expenses in the amount of \$11,940 due and owing for the months of May and June, 1971, which sums, as explained in Mr. Taylor's affidavit, were converted by Mr. Frank. Indeed, such amount is not reflected by the books and records as ever having been paid over to AOBC by Frank.

Exhibit "I" is the statement prepared for the agreement year ending April 30, 1972. During that period, AOBC received income of \$82,775 but had operating expenses and interest and mortgage payments totalling \$84,240. Consequently, AOBC realized no net income for agreement year 1972 and, indeed, suffered a net loss of \$1,465, thus obligating Frank to pay the sum of \$70,000 plus the \$1,465 loss for a total of \$71,465.

Exhibit "J" is the statement prepared for the agreement year ending April 30, 1973, and shows due and owing from Frank the sum of \$38,824. During that period, AOBC received income of \$116,193 and had operating expenses and mortgage payments totalling \$85,017, so that net income to AOBC for that period amounted to \$31,176. Since Frank guaranteed AOBC a net annual income of \$70,000, he was obligated, under the terms of the guaranty, to pay the difference between \$70,000 and \$31,176, or \$38,824.

While I have not as yet finalized the statement for the agreement year ending April 30, 1974, based upon my examination of AOBC's books and records I estimate that the amount due and owing from E. RENE FRANK for that year is the sum of \$38,463.

A100

As stated in the Taylor affidavit and as reflected by AOBC's books and records, no part of the aforementioned amounts has been paid by Frank to AOBC.

WHEREFORE, it is respectfully requested that the relief requested in the annexed Notice of Motion be in all respects granted.

Steven A. Kriegsmann

STEVEN A. KRIEGSMAN

Sworn to before me this

16th day of September, 1974

Dorothy R. Eaton

DOROTHY R. EATON
Notary Public - State of New York
No. 41-1666052 Queens County
Cert. Filed in New York County
Term Expires March 30, 1975

PROOF OF SERVICE

A101

The undersigned, an attorney admitted to practice in the court of New York State,

☐ Certification
By Attorney

certifies that the within

☐ Attorney's
Affirmation

shows: deponent is

the attorney(s) of record for
in the within action; deponent has read the foregoing
and knows the contents thereof; the same is
true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,
and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

The name signed must be printed beneath

☐ Individual
Verification

the

the foregoing

deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

being duly sworn, deposes and says: deponent is
in the within action; deponent has read
and knows the contents thereof; the same is true to
to those matters deponent believes it to be true.

☐ Corporate
Verification

the

of

a

corporation,

foregoing

is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and
belief, and as to those matters deponent believes it to be true. This verification is made by deponent because
in the within action; deponent has read the
and knows the contents thereof; and the same
is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

Dorothy R. Eaton,

is over 18 years of age and resides at 30-76 35 Street, Astoria, N. Y. 1001 11103;

☒

Affidavit
of Service
By Mail

On September 16, 1974 deponent served the within Notice of Motion and Affidavit
upon E. Rene Frank, Defendant and Third-Party Plaintiff,

(Malaga), Spain,

in this action, at Avenue Ricardo Soriano 12, Marbelli

the address designated by the attorney for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in ~~the~~ official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐

Affidavit
of Personal
Service

On

19

at

deponent served the within

upon

herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on September 16, 1974

Gary P. Rosenthal

Dorothy R. Eaton
The name signed must be printed beneath
Dorothy R. Eaton

GARY P. ROSENTHAL
Notary Public, State of New York
No. 03-3359405
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1975

A102

TELEGRAM

ZCZC FAA 295 VIA 111 RJB 657 124

UINY HL ESBA 102

RECEIVED

MARBELLA 192 4 2100 PAG L/50

OCT. 7, 1974

LT

HAVENS WANDLESS ATTN DAVID TAYLOR

99 PARK AVENUE

NEW YORK

HAVE RECEIVED TODAY OVER FIFTY PAGES CONTINUED LEGAL DOCUMENTATION EXHIBITS NOTICES OF MOTION CONCERNING ALLENTOWN OFFICE BUILDING MATTER STOP THESE DOCUMENTS ARE DATED SEPTEMBER SIXTEEN STOP YOU ARE WELL AWARE THAT DOCTOR RUGER AND I HAVE AGREED UPON A SETTLEMENT OF

COL 99

P2//52 RJB 657 124

THIS MATTER DURING OUR MEETING HERE IN SPAIN ON MONDAY SEPTEMBER SECOND STOP IT IS EVIDENT THAT YOUR ACTIONS ARE ONLY FOR THE PURPOSE OF CAUSING ADDITIONAL COSTS FOR YOUR CLIENT AND FOR TRYING TO IMPEDE SETTLEMENTS YOUR CLIENT AND I ARE DESIROUS AND HAVE BEEN DESIROUS OF REACHING

1

Frank

9

2

A She is present at all times, but she is

3

not working for me full time.

4

Q I see.

5

A So that I have uninterrupted service.

6

Q Are you an American citizen?

7

A I am.

8

Q Do you speak and write any foreign

9

languages with fluency?

10

A I do.

11

Q Which ones?

12

A I speak French and write French; I speak

13

German and write German; I speak Spanish and write it

14

more or less well.

15

Q Are you a college graduate?

16

A I am.

17

Q What degree?

18

A I have a law degree from the University

19

of Aix en Provence. I have also a degree from

20

Columbia University for real estate appraisal advanced.

21

I don't know what it's called, one or two. I went

22

there for two years.

23

Q I am going to show you, Mr. Frank, a copy

24

of an agreement dated June 26, 1970, between Allentown

25

Office Center Association and Interboden A.G. Do you

LETTER TO HAVENS, WANDLESS, STITL & TIGHE, ESQS.
Robert Jay Dinerstein
ATTORNEY AT LAW

A104

Seventy-One So. Central Avenue
Valley Stream, N. Y. 11580
(516) 561-2261

December 2, 1974

Havens, Wandless, Stitl &
Tighe, Esqs.
99 Park Avenue
New York, New York 10016

Re: Allentown Office Building Co. v.
Frank v. Sawyna
73 CIV 192?

Gentlemen:

This office now represents Mr. Frank with regard to the captioned matter.

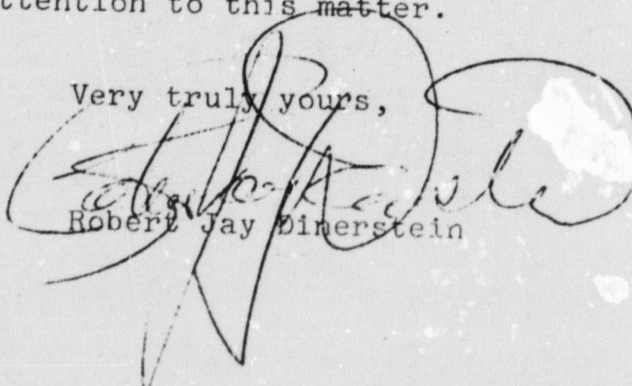
At this time we are attempting to determine the exact status of the matter and to obtain copies of the pleadings so that we may properly protect Mr. Frank's interests.

Mr. Frank does advise me that he has reached a settlement of the matter with on Dr. Ruger who is apparently a party in interest. A copy of certain correspondence relating thereto is enclosed in the event that you were unaware thereof.

Please be good enough to advise me of your clients current position and intentions.

Thank you for your prompt attention to this matter.

Very truly yours,


Robert Jay Dinerstein

RJD:er

A105

LETTER TO ROBERT JAY DINERSTEIN, ESQ.

December 18, 1974

Robert Jay Dinerstein, Esq.
Seventy-One So. Central Avenue
Valley Stream, New York 11580

Re: Allentown Office Building Co. v. Frank

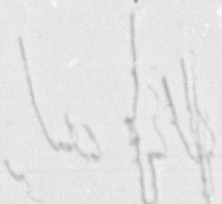
Dear Mr. Dinerstein:

We are in receipt of your letter of December 2, regarding the above captioned matter.

Mr. Frank is presently in default in appearing for the taking of his deposition scheduled for November 18, 1974, in aid of enforcement of the Judgment rendered against him in the above matter. We now intend to move for an order compelling his appearance under pain of contempt and arrest. However, if Mr. Frank is prepared to appear at a mutually satisfactory date, we invite that advice.

Very truly yours,

GPR:KH


Gary P. Rosenthal

AFFIDAVIT OF DR. RENTAUS RUGER
A F F I D A V I T

A106


In full knowledge of the consequences of an incorrect affidavit I subscribe the following:

I submit this affidavit in opposition to the motion of Mr. E. René Frank to vacate the judgment entered against him in the United States district court for the southern district of E. René Frank (73 civ. 1923 (rjw)), and particularly to advise the court of the circumstances surrounding the purported settlement "negotiations" allegedly undertaken between Mr. Frank and myself, to which Mr. Frank adverts in his affidavit dated February 28, 1975.

In September 1974 I attended an international real estate conference in Marbella, Spain, at which conference Mr. Frank was also present. During the course of the conference, Mr. Frank sought me out with a proposed offer of settlement of this case. I did not agree to Mr. Frank's proposed offer, and I suggested that the matter be discussed with counsel for plaintiff. My conversation with Mr. Frank was brief and constituted my only personal contact with him during or subsequent to the conference. That was the full extent of the alleged "negotiations". There was no discussion whatsoever as to the status of the law suit.

Mr. Frank's statements are fabricated. At no time did I advise Mr. Frank that a settlement has been agreed upon. At no time did I tell Mr. Frank, or lead him to believe, that plaintiff would not expeditiously proceed to enter judgment against him in this action, or that once obtained, such judgment would not be enforced. Indeed, I am a German citizen, am not an attorney and am unfamiliar with the procedures followed in the U.S. courts.

Subsequent to our meeting in Marbella, I wrote to Mr. Frank by letter dated October 4, 1974, and, in part, confirmed to him that while no settlement had yet been reached, plaintiff was always ready to settle upon receipt of a serious, reasonable proposal. However, and to the extent it is relevant, I am advised that, to date, not other offer has been received or discussed. Moreover, I am unable to understand how Mr. Frank could have, in good faith, even proposed settlement in light of his concededly precarious financial condition.



In short, while Mr. Frank attempts to create a contrary impression, there was no continuing dialogue between us regarding settlement, no less the slightest suggestion from me that plaintiff would not proceed diligently in this matter. I respectfully submit that this is all just another attempt by Mr. Frank at delay and subterfuge which has apparently characterized these proceedings and plaintiff's dealings with him.

Zug, 12th March, 1975

.....
(Dr. Detlev Renatus Rüger)

Beglaubigung:

Obenstehende Unterschrift von Herrn Dr. Detlev Renatus Rüger, geb. 18.1. 1933, deutscher Staatsangehöriger, wohnhaft in D 5 Köln(BRD), Stadtwaldgürtel 79, wird hiermit amtlich als echt beglaubigt.

Zug, 12. März 1975

Die Urkundsperson:

Die Echtheit der Unterschrift des
Herrn Dr. Detlev Renatus Rüger
wird hiermit amtlich beglaubigt.
Zug, den 12. März 1975
Staatskanzlei des Kantons Zug

Der Adjunkt:

F. F. Fallegger
Franz Fallegger



SWISS CONFEDERATION
CANTON AND CITY OF ZÜRICH
CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

no:

A108

I, James S. Huffman, Vice Consul
of the United States of America at Zürich, Switzer-
land, duly commissioned and qualified, do hereby
certify that

Franz Fallegger

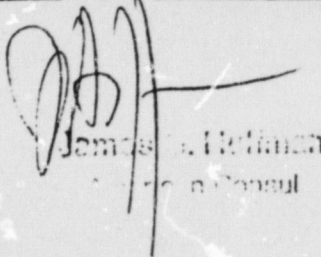
whose true signature and official seal are, respectively,
subscribed and affixed to the foregoing document,
was, on the

12th day of March, 19 75
the date thereof, Legalizing officer of
the State Chancery of the Canton of
Zug at Zug, Switzerland

duly commissioned and qualified, to whose official
acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my
hand and affixed the seal of the Consulate General
of the United States of America at Zürich, Switzer-
land, this

12th day of March, 19 75


James S. Huffman
Vice Consul



AFFIDAVIT OF DAVID G. TAYLOR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

ALLENTOWN OFFICE BUILDING CO., :

Plaintiff-Judgment Creditor, : Index No. 73 CIV. 1923
(RJW)

-against- :

E. RENE FRANK, : AFFIDAVIT

Defendant-Judgment Debtor. :

----- x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

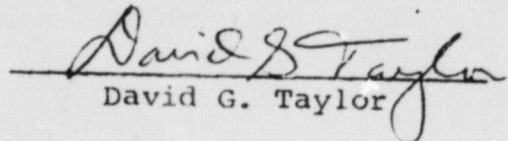
DAVID G. TAYLOR, being duly sworn, deposes and
says:

I am a member of the firm of Havens, Wandless,
Stitt & Tighe, attorneys for the plaintiff-judgment creditor in
the above-entitled action, and also Secretary of plaintiff
corporation. I submit this affidavit in opposition to the motion
of defendant to vacate the judgment heretofore rendered against
him and particularly, to advise the Court with respect to the
meeting I allegedly had with defendant in Spain, about which he
writes on page three of his moving affidavit.

In October 1974, while on a business-vacation trip
to Europe, and on the day I was leaving Marbella, Spain, I ran
into defendant as I was leaving my hotel dining room after
breakfast. Mr. Frank was with other people and my contact with

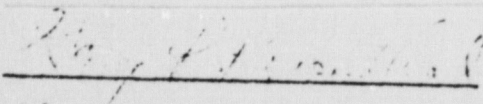
him was casual and extremely brief. In an offhand manner he told me that he had received a letter from Dr. Rueger concerning a proposed settlement of the case, a copy of which I could pick up from him, and that he had sent me a cable. Not one further word was said. Thereafter, on my way to the airport, I stopped by Mr. Frank's office and was handed a copy of the letter by a secretary. Mr. Frank was not even present. In summary, at no time was the status or prosecution of this lawsuit discussed.

WHEREFORE, it is respectfully requested that the motion of defendant to vacate the judgment against him, be in all respects denied.


David G. Taylor

Sworn to before me this

15th day of April, 1975.



GARY P. ROSENTHAL
Notary Public, State of New York
No. 03-0352405
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1975

A111

AFFIDAVIT OF BERNARD HIRSCHHORN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ALLENTOWN OFFICE BUILDING CO.,

Plaintiff-Judgment Creditor,

-against-

E. RENE FRANK,

Defendant-Judgment Debtor.
-----x

73 Civil Action
File
No. 1923
(Judge Robert J.
Ward)

STATE OF NEW YORK)
 SS.:
COUNTY OF QUEENS)

BERNARD HIRSCHHORN, being duly sworn, deposes and says:

1. That I respectfully submit this affidavit in reply to the opposition of Plaintiff to open the Default Judgment against Defendant on the 18th day of October, 1974.

2. Annexed hereto is a copy of the translation of a letter from DR. RENATUS RUGER, the principal of Plaintiff, ALLENTOWN OFFICE BUILDING CO. to Defendant, dated October 4th, 1974, only two (2) weeks prior to the entry of the Default Judgment, which clearly indicated that negotiations were actively taking place between the parties at the time, or just

Affidavit of Bernard Hirschhorn

prior thereto, of the entry of the Default Judgment.

3. Your deponent has spoken to ROBERT DINERSTEIN, ESQ., concerning the allegations of counsel for Plaintiff. Mr. Dinerstein advised your deponent that at no time had he ever represented Defendant but merely had discussions with him regarding possible representation which never came to be.

4. That for the purpose of this motion, deponent relies upon the factual allegations set forth in his affidavit and that of Defendant in support of the motion to open the Default Judgment and in opposition to the motion to punish defendant for contempt of court.

s/ Bernard Hirschhorn
BERNARD HIRSCHHORN

Sworn to before me this
25th day of March, 1975.

s/ George M. Weston
Notary Public
State of New York
No. (Illegible)
Qualified (Illegible)
Comm. Expires March 10, 1976

TRANSLATION OF DR. RUGER'S LETTER TO PLAINTIFF
ANNEXED TO FOREGOING AFFIDAVIT

Translation of Letter

Dr. Renatus Ruger to E. Rene Frank
dated October 4, 1974

Dear Rene:

Many thanks for your letter of September 25th. I would like to restate to you and clarify that I am ready to settle our legal involvement in the U.S. as I have told you during our last meeting, conditioned on the legal consent on the attorneys who are handling the legal matter of my company in the U.S.; Havens, Wandless, Stitt & Tighe of New York.

At that time, (of our last meeting) we have explored the various possibilities and you have consented and confirmed in writing a solution which I have found basically interesting for my group. I would like to comment that I am not in agreement with the first paragraph of your letter wherein a full settlement had been reached between us.

To restate your offer: you would repurchase 50% of the Allentown property - i.e. 50% of the shares of the Allentown building at a net value of \$125,000 which is more or less my cost price at the time of acquisition. However, this does not include the interim amortization.

For the loss of rent which you have guaranteed we should find a solution whereby I would purchase a penthouse in the Holiday Park of Marbella. As I would receive this penthouse at a reduced price of around \$65,000 this would correspond approximately to one half of the settlement.

You would have to deliver the purchase price plus amortization, which we would have to agree upon at the time of the delivery of the shares of the Allentown building and you would have furthermore deliver the penthouse free and clear.

This would then give us the possibility to recouperate the book losses of the Allentown building at a future resale of this property.

I have sent to the attorneys a copy of this letter. Please let me know what your thoughts are and I remain with friendly regards.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALLENTOWN OFFICE BUILDING CO.,

Plaintiff-Appellee,

- against -

E. RENE FRANK,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK

ss.:

I, James A. Steele

being duly sworn,

depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N.Y.

That on the ~~15th~~ 8th day of October 1975 at

99 Park Ave, N.Y., N.Y.

deponent served the annexed *Appendix*

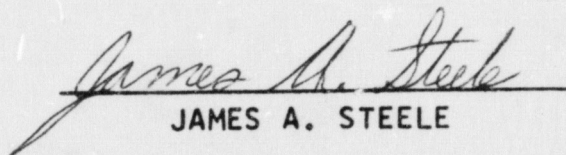
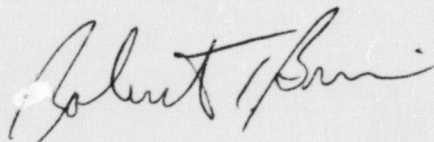
upon

Havens Wandless Stitt & Tighe

the Attorneys

in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 8th
day of October 1975


JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977